No.

82-1410

IN THE

Supreme Court of the United States

October Term, 1982

MILLIKEN RESEARCH CORPORATION and CHAVANOZ, S.A.,

Petitioners,

v.

BURLINGTON INDUSTRIES, INC., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SIMON H. RIFKIND
JAY TOPKIS
(Counsel of Record)
STEVEN B. ROSENFELD
GERARD E. HARPER
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 Park Avenue
New York, New York 10154
(212) 644-8000

Attorneys for Petitioners Milliken Research Corporation and Chavanoz, S.A.

Of Counsel:

HOWARD E. MANNING, SR.
MANNING, FULTON & SKINNER
801 Wachovia Bank Building
Raleigh, North Carolina 27602

QUESTIONS PRESENTED

1. This case presents again the question on which this Court granted certiorari in *Weyerhaeuser Co.* v. *Lyman Lamb Co.*, U.S. 81-1618: in an antitrust price-fixing case in which only one element of a two-part price is fixed, may the plaintiff prove its damages by proving merely the full amount of the fixed element—or must plaintiff prove the difference between the total price actually paid and the total price that would have been paid but for the conspiracy?*

2. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), rejected *in pari delicto* as a defense to antitrust liability. In a trial to determine the amount of damages that plaintiff sustained by reason of an antitrust violation, does *Perma Life* also bar defendant from introducing evidence that plaintiff's own actions, not the antitrust violation, proximately caused some or all of plaintiff's damages?

3. Does *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981), which held only that there is no implied right of action for contribution between joint antitrust wrongdoers, also strip a court of the power to exclude from an antitrust plaintiff's recovery the damages attributable to the plaintiff's dealings with a joint tortfeasor

* The petition in *Weyerhaeuser* put the question this way: "Can the measure of damages in cases involving the alleged fixing of only one element of price be based solely on that single element, or must it reflect the challenged conduct's effect on the total price paid by the buyer?"

We are advised that defendants and counsel for class plaintiffs have reached a settlement in *Weyerhaeuser*, and that a motion to vacate the writ of certiorari as moot awaits settlement-approval proceedings in the district court.

who has settled—or does a court have power to regulate abuses of the judge-made rule of joint-and-several liability by eliminating such damages from a plaintiff's claim?

4. In an antitrust case in which issues of liability and damages were tried separately, was it a denial of due process to allow an antitrust plaintiff to recover damages allegedly incurred by a subsidiary, when no notice was given of the subsidiary's claim until years after judgment had been entered on the issue of liability?

PARTIES TO THE PROCEEDING

In addition to petitioners, the appellants/cross-appellees below were ASA, S.A. (a French corporation formerly known as Ateliers Roannais de Constructions Textiles, S.A.), ARCT, Inc., a partly-owned subsidiary of ASA, and Milliken & Company (formerly Deering Milliken, Inc.). Milliken & Company has filed a separate petition for certiorari.

The only other parties to this proceeding are respondent Burlington Industries, Inc. and its onetime subsidiary (now division), Madison Throwing Company, Inc.*

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* Petitioner Milliken Research Corporation has no subsidiaries and is itself a wholly-owned subsidiary of Milliken & Company. Petitioner Chavanoz, S.A. is a French corporation which, to counsel's knowledge, has no publicly-held subsidiaries or affiliates.

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Petitioners Milliken Research Corporation and Chavanoz, S.A. ask that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourth Circuit, entered on September 23, 1982.

OPINIONS BELOW

This petition arises from a multimillion-dollar judgment on damages in a bifurcated antitrust case in which liability was previously adjudged.

The opinion of the Court of Appeals on damages is reported at 690 F.2d 380 and appears as App. A in the Joint Appendix. The original opinion of the District Court on damages, unofficially reported at 1981-82 CCH Trade Cas. ¶ 64,214 (D.S.C. 1981), appears as App. B. The District Court's unreported opinion amending its original damages decision appears as App. C. An unreported decision and order of the District Court on certain damages issues appears as App. D.

The opinions on liability are not contained in the Joint Appendix but are officially reported as *Duplan Corp.* v. *Deering Milliken, Inc.*, 444 F. Supp. 648 (D.S.C. 1977), *aff'd in part and rev'd in part,* 594 F.2d 979 (4th Cir. 1979), *cert. denied,* 444 U.S. 1015 (1980).

JURISDICTION

The judgment of the Court of Appeals (App. G) was entered on September 23, 1982. A timely petition for rehearing and rehearing *en banc* was denied on November 26, 1982 (App. H). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in pertinent part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court

of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 4b of the Clayton Act, 15 U.S.C. § 15b, provides provides in pertinent part:

"Any action to enforce any cause of action under sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued."

The Fifth Amendment to the United States Constitution provides in pertinent part:

"No person shall be . . . deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The Parties: Petitioners and allied companies ("defendants") sold and licensed patented machinery to textile manufacturers. The machines enabled textile manufacturers (or "throwsters") to treat synthetic yarns through a process called "false twist." The false twist process rendered synthetic yarns such as nylon and polyester suitable for a wide range of uses, from hosiery and double knits to woven fabrics for dresses and suits.

Defendants opted to receive a portion of their compensation for the patented machines in the form of patent royalties. The throwsters paid an initial purchase price for each machine, and thereafter, under the terms of a license to use the patented features embodied in the machine, the

throwsters periodically paid a production royalty on the amount of yarn produced.*

Respondent Burlington Industries, Inc. ("plaintiff"), the largest textile company in the world, was a competitor of defendant Milliken & Company in the production of many textile products. Plaintiff purchased defendants' patented machines and paid production royalties.

Plaintiff also bought false twist machines from Leesona Corporation, by far the world's largest manufacturer and seller of false twist machines. Like defendants, Leesona owned patents covering its machines, and charged its throwster-customers a production royalty.

The Liability Trial: In 1969, plaintiff brought suit against defendants alleging, among other things, that defendants had conspired with Leesona to stabilize the price of false twist machines. Jurisdiction was based on 28 U.S.C. §§ 1331, 1337 and 1338. Plaintiff's action was consolidated with actions by nineteen other throwsters (all since settled), and trial was bifurcated to allow separate consideration of liability and damages. App. J, JA111. Leesona was not made a party in any of these consolidated actions.

On liability, the trial court held that defendants had joined in a conspiracy with Leesona in 1964, when defendants and Leesona settled some litigation involving three Leesona patents—Leesona had claimed that defendants' machines infringed the Leesona patents, and the settlement,

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* One defendant, Chavanoz, was the owner of the patents. Chavanoz licensed a French company, defendant ASA, or "ARCT-France," to make and sell the machines, while defendant Milliken Research Corporation ("DMRC") was licensed to use the machines, with a right to sublicense. DMRC issued sublicenses to throwsters and collected the royalties, which it divided with Chavanoz.

in broad outline, provided that each side would not sue the other's customers for patent infringement. The court found that the purpose and effect of this settlement was to stabilize and maintain, at existing levels, the patent royalty rates which defendants and Leesona charged their respective customers. 444 F. Supp. at 683-85.

In its opinion adjudging liability, the trial court ruled also that the conspiracy had had an "impact" on throwsters sufficient to predicate liability for trebled damages under Section 4 of the Clayton Act (15 U.S.C. § 15). The court based this finding solely on the undisputed evidence that each of the plaintiff-throwsters had paid royalties to defendants. 444 F. Supp. at 687 & n.20. The court had no occasion to consider the *amount* of damages, if any, that plaintiff sustained by reason of the conspiracy; that question was reserved for later trial.

The trial court's ruling on liability was affirmed by the Fourth Circuit in all relevant parts, 594 F.2d 979 (1979), and this Court denied certiorari, 444 U.S. 1015 (1980).

The Damages Trial: Plaintiff perceived the ensuing damages trial as an exercise in arithmetic: in its damages case, plaintiff introduced *only* the full amount of the royalties it had paid to defendants ($2.7 million) and Leesona ($4.9 million), and then asked the trial court to rule, as a matter of law, that damages equaled full royalties. Defendants moved to dismiss on the ground that plaintiff had failed to prove the amount of the illegal overcharge—the difference between the royalties actually paid and the royalties or other payments that would have been paid if there had been no conspiracy—and thus had not proven any damages.

The trial court denied defendants' motion to dismiss, ruling that full royalties were the measure of damages, subject to diminution only by the modest value of technical support services which defendants and Leesona each supplied to throwsters. The court then refused defendants' formal offer of proof that, had there been no royalty-fixing conspiracy, plaintiff would have paid *some* royalties and would also have paid *increased prices* for the patented machines. App. B, JA39-40.*

In consequence, the only issue actually tried was the value of the technical support services. The trial court found these to be worth 10% of the royalties paid to defendants and 5% of Leesona royalties. Subtracting these sums, the court entered judgment in favor of plaintiff for three times the remainder—a total of $20.9 million. App. B, JA67.**

The Fourth Circuit's Decision: The Fourth Circuit vacated the damages judgment and remanded for a new damages trial.

But the ruling came in an opinion at war with itself. The Fourth Circuit held that "the district court erred in using the actual royalties paid as the measure of damages without considering whether royalties or some other compensation would have been payable absent the illegal conspiracy." 690 F.2d at 386; App. A, JA11.

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* Plaintiff had previously sought and obtained a ruling that defendants were not entitled to take discovery on the issues whether plaintiff would have paid some royalties and increased machine prices. App. D, JA76-77.

** Relying on the doctrine of claim reduction, the district court subsequently reduced the judgment to $7.4 million by excluding from the award the damages attributable to plaintiff's royalty payments to Leesona. The Fourth Circuit overturned this reduction. *See* Point III *infra*.

Strangely, however, the Court of Appeals went on to say: "... we further hold that the royalties actually paid may serve as a prima facie estimate or 'yardstick' of damages, which defendants must overcome with persuasive evidence." *Id.*

Thus the Fourth Circuit has ordered a retrial of damages, but has ruled that plaintiff may do on the retrial exactly what it did on the first damages trial: prove its full royalty payments, and rest. And then, the court below has held, it is defendants who must come forward and prove the real extent of plaintiff's damages.

REASONS FOR GRANTING THE WRIT

I

The Fourth Circuit's decision conflicts with the law in other circuits that an antitrust plaintiff must prove damages by reference to the total price.

In price-fixing cases, it is a fundamental that damages —the illegal overcharge—are determined by the "difference between the price paid and the market or fair price that [plaintiff] would have had to pay under natural conditions had the combination been out of the way." *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U.S. 390, 396 (1906). And it is equally settled that the antitrust plaintiff, *not* the defendant, has the burden to establish, with evidence, not simply the fixed price he actually paid, but a just and reasonable estimate of the amount of the *difference* between the fixed and the fair market price. *See Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946); *Westinghouse Elec. & Mfg. Co.* v. *Wagner Elec. & Mfg.*, 225 U.S. 604, 616 (1911).

The lower courts are divided and confused on the proper application of these basic rules to cases in which only one element of a two-part price is fixed—a conflict this Court had decided to hear in *Weyerhaeuser Co.* v. *Lyman Lamb Co.*, U.S. 81-1618. The Fifth Circuit (in *Weyerhaeuser*) and now the Fourth have stated the view that, in two-part pricing cases, an antitrust plaintiff may satisfy its burden of proof merely by showing the full amount of the fixed portion of the price actually paid. Decisions in the Second, Ninth, Tenth and Eleventh Circuits, on the other hand, have adopted the view that, in such cases as in all other antitrust price-fixing cases, a plaintiff's evidence on damages must establish the effect of the challenged conduct on the total price the plaintiff paid for the product.

One of these views is wrong. Without a definitive ruling from this Court, which has never directly addressed the issue, that error is certain to haunt and prolong every price-fixing case (and they are common) in which the seller is compensated in two or more ways for the same basic good or service.

The basic good bought by plaintiff here was patented textile equipment. There is no basis in law or logic to separate the intangible patent rights from the tangible equipment which embodied them; both lower courts, indeed, explicitly recognized that the patent royalties "constituted in effect a part of the purchase price for [false twist] machines." 690 F.2d at 385, App. A, JA9; 444 F. Supp. at 673.* To prove damages, therefore, plaintiff was re-

* In the parallel litigation involving the throwsters' claims against Leesona (discussed *infra* pp. 14, 19), the Fifth Circuit adopted the same view. *In re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127, 1136 (5th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977) ("the sales price of the [Leesona false twist] machinery consists of two elements: the initial price of the machine and the royalty payments").

quired to show the difference between the total price actually paid for the machines and patents together, and the total fair market price that would have been paid for the machines and patents in an unstabilized market. But plaintiff made no such showing—it offered not a single piece of damages evidence beyond the amount of the royalties actually paid, and, in a calculated trial tactic, sought and obtained rulings that no more proof was required.

The Fourth Circuit's approval of that approach—its ruling that proof of full royalties establishes a *prima facie* case, and its decision to remand rather than to order dismissal forthwith of plaintiff's claim—is in conflict with the one case which the Fourth Circuit acknowledged was "directly on point," *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948).

In *Alden-Rochelle*, the court found a conspiracy to fix the royalties paid by theater owners for the right to perform copyrighted music which was incorporated in motion pictures. The price paid by theater owners for the right to perform a motion picture was composed of two parts: film rental, paid to the producer of the film, and copyright royalties, paid to the proprietors of the musical copyrights. To prove damages, plaintiff theater owners, like plaintiff here, offered as evidence only the full amount of the copyright royalties paid. The plaintiff theater owners did not prove the royalties which would have been paid but for the conspiracy, nor did they prove the effect on motion picture rentals which would have resulted from the elimination of fixed royalties. Holding that plaintiffs' proof of fixed royalties did not prove the extent of plaintiffs' damages, the court dismissed the damages claim for failure to establish a *prima facie* case (80 F. Supp. at 898):

> "*None of the cases hold that those who have paid a monopolist a price for its product, may claim that the extent of their damage is the full amount paid.* The amount of any overcharge may be recovered, but the purchaser should offer *some evidence* from which the trial court may reasonably approximate the overcharge. . . . *The burden of proof is on plaintiff to show that part of his case by a fair preponderance of the evidence.* When it comes to proving the extent of his damage the burden a plaintiff carries in an anti-trust action is lighter; all he need prove are the basic facts from which the court may reasonably approximate the amount of the damages. *A plaintiff does not satisfy that burden by offering no proof at all, except what he paid the violator.*" (Emphasis added.)

To the same effect, and equally in conflict with the Fourth Circuit's ruling here and the Fifth Circuit's decision in *Weyerhaeuser,* are decisions in at least three other circuits holding that, in multi-element pricing cases, a plaintiff must prove more than simply the full amount of the tainted price.

For example, in *Siegel* v. *Chicken Delight, Inc.,* 448 F.2d 43 (9th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972), a tie-in class action, plaintiffs showed only the amount by which the contract price on the tied items exceeded the market price for comparable items; the Court of Appeals, reversing a directed verdict for plaintiff class on the issue of fact of damage, held that the damages evidence must establish the difference between the total contract price for both the tied and tying items and the total price that would have been paid for both items but for the tie-in. *Id.* at 52-53; *accord, Kypta* v. *McDonald's Corporation,* 671 F.2d 1282, 1286 (11th Cir.), *cert denied,* 103 S.Ct. 127 (1982) ("even assum-

ing *arguendo* an overcharge in the amount of rent due under the tied product,'' defendant ''might otherwise have upped the price exacted for its franchise'').

Similarly, in *Albertson's Inc.* v. *Amalgamated Sugar Co.*, 62 F.R.D. 43 (D. Utah 1973), *aff'd in pertinent part*, 503 F.2d 459, 463 (10th Cir. 1974), in which plaintiff retailers alleged that defendant sugar wholesalers had fixed the freight charges on sugar, both trial and appellate courts rejected plaintiffs' assumption that damages were ''an amount equal to the phantom freight they now pay''; rather, as the trial court there said, ''it is clear'' that, but for the conspiracy, defendant wholesalers ''would have to raise their base price'' for sugar. *Id.* at 53; *accord, Boise Cascade Corp.* v. *FTC*, 637 F.2d 573, 580 (9th Cir. 1980) (''common sense'' that drop in allegedly fixed freight charge would compel change in price of plywood).*

The Fourth Circuit's departure from these overcharge cases etches in sharp relief the conflict which this Court was set to resolve in the *Weyerhaeuser* case. In *Weyerhaeuser*, the Fifth Circuit upheld a jury instruction that limited the damages issues to consideration of only the fixed element (the freight charge) of the total price of the product (plywood). *In re Plywood Antitrust Litigation*, 655 F.2d 627, 635 (5th Cir. 1981), *cert. granted sub nom. Weyerhaeuser Co.* v. *Lyman Lamb Co.*, 102 S. Ct. 2232

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* *Accord, Jacobi* v. *Bache & Co.*, 377 F. Supp. 86, 93-94 (S.D. N.Y.), *aff'd*, 520 F.2d 1231 (2d Cir. 1974), *cert. denied*, 423 U.S. 1053 (1976) (plaintiff's proof of damages from conspiracy to eliminate one element of commission payments must include consideration of other elements); *cf. Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 648-49 (1980) (holding that a conspiracy to fix one element of a price [credit payments] is a *per se* violation, this Court notes that elimination of the fix might affect the up-front or "invoice" price of the good).

(1982). Like the Fourth Circuit here, the Fifth Circuit there held that damages from a price-fixing conspiracy equal treble the full amount of the fixed element of the total price—in effect, a rule of automatic damages which relieves the plaintiff of the burden to prove the extent of its injury.

Such a rule of automatic damages is utterly foreign to the principle enunciated by this Court in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946), the case on which both the Fourth and Fifth Circuits relied. In *Bigelow* and like cases, this Court has held that a plaintiff may not be denied antitrust recovery solely because the damages evidence is based on approximation: establishing the price that would have been paid but for a conspiracy necessarily involves a hypothetical reconstruction of an untainted market, and so damages will always involve some degree of imprecision. 327 U.S. at 264-65. But that holding was intended to guide a court's evaluation of a plaintiff's evidence of what would have happened, *not* to allow the plaintiff simply to assume that the damages equal the fixed price. Indeed, *Bigelow* warned that, "even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation and guesswork." *Id.* at 264.

More recently, in reaffirming this essential qualification of the *Bigelow* principle, this Court rejected the view that a plaintiff is entitled to "automatic" damages as a matter of law or assumption, awarded without evidence of the economic and market realities existing during the damages period. *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 566-67 (1981) (damages for price discrimination in violation of Robinson-Patman Act).

The legal standard adopted by the Fourth and Fifth Circuits ignores market realities, substitutes assumption for evidence, and endorses a concept of automatic damages. By presuming an antitrust plaintiff's entitlement to a trebled refund of the tainted price, the standard imposes liability not for stabilizing a price, but for charging the price in the first place. The result is potentially staggering damages judgments (here, in the tens of millions of dollars) that bear no relationship to the actual injury caused by the antitrust violation.

The confusion and conflict in the lower courts on this issue present the paradigm for granting certiorari under this Court's Rule 17. As it was set to do in *Weyerhaeuser*, this Court should now put an end to the disarray.

II

The Fourth Circuit's decision conflicts with the law in other circuits that evidence of causation is relevant to the amount of antitrust damages.

This case is particularly appropriate for certiorari, because the Fourth Circuit's decision reflects profound confusion not only about the type of evidence an antitrust *plaintiff* must offer to satisfy its burden of proof, but also about the type of evidence an antitrust *defendant* may offer to rebut plaintiff's showing. In a separate portion of its opinion, the divided court below held that defendants could not introduce evidence that more than half plaintiff's alleged damages—its $14 million claim to recover treble the royalties paid to Leesona—was the direct and proximate result, not of defendants' actions, but of plaintiff's own.

This ruling, which again places the Fourth Circuit in conflict with other courts, raises the second question on which we seek review: may an antitrust defendant introduce evidence that the plaintiff's *own* actions, and *not* defendants' antitrust violation, were the proximate cause of the plaintiff's claimed damages?

Here, defendants' proffered evidence would have shown that, shortly before defendants settled their patent litigation with Leesona (thereby joining the adjudged conspiracy), plaintiff *itself* had settled litigation with Leesona over the *same* Leesona patents; as part of the settlement, we offered to prove, plaintiff had agreed to acknowledge the validity of the Leesona patents, and to pay the Leesona royalty rate, in exchange for a secret competitive edge over all other Leesona customers in the form of a hidden one-third kickback on its royalty payments to Leesona. This secret deal had the direct effect of stabilizing Leesona royalties: in a later antitrust suit brought by plaintiff and other throwsters against Leesona, the Fifth Circuit held that the kickback scheme fixed the royalties on (and thus the price of) Leesona machines; our proof would have shown that plaintiff engineered the deal to achieve exactly that result, thereby causing the Leesona-related damages of which it now complained.*

Completely ignoring causation analysis, the majority opinion below characterized our proffered evidence as rele-

* The Fifth Circuit's ruling came in an antitrust suit (parallel to this one) brought against Leesona by various throwsters including plaintiff. *In re Yarn Processing Patent Validity Litigation,* 541 F.2d 1127, 1136 (5th Cir. 1976), *cert denied,* 433 U.S. 910 (1977). Plaintiff's participation in the scheme was never aired in that suit because, once Leesona's violation had been established but before consideration of damages, Leesona and plaintiff settled. *See* Point III *infra.* The trial court here deducted Leesona's kickbacks to plaintiff from the royalties awarded as trebled damages.

vant *only* to an *in pari delicto* defense to liability, and therefore "not timely" at the damages trial. 690 F.2d at 387; App. A, JA13.

In a strongly-worded dissent, Circuit Judge Kenneth Hall rejected the majority's "pat dismissal" of the evidence and expressed his "astonish[ment]" that the court "would countenance [plaintiff's] opportunistic approach to this case much less sanction a reward for such reprehensible conduct." *Id.* at 395, 397; App. A, JA32, 36. Recognizing that the issue on damages was whether some or all of plaintiff's ostensible wounds were self-inflicted, Judge Hall reasoned that plaintiff "should not now be heard to complain that it was actually harmed by its own scheme" to stabilize Leesona royalties. *Id.* at 397; App. A, JA36.

The majority's ruling that our proffer related only to the "liability" defense of *in pari delicto* does violence to the teachings of *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 140 (1968). There, this Court explicitly held that the *in pari delicto* doctrine can never be a defense to *liability,* but the Court went on to rule that "the possible beneficial byproducts of a restriction from a plaintiff's point of view can of course be taken into consideration in computing damages." And the concurring opinions in *Perma Life* agreed that evidence which might previously have related to an *in pari delicto* defense was now relevant, if at all, to the question of *damages. See id.* at 146 (White, J.) (evidence of plaintiff's actions relevant to "the issue of causation in particularized form"); *id.* at 151-52 (Marshall, J.) (evidence of plaintiff's actions relevant to prevent "unjust enrichment").

In excluding such causation evidence here, the majority's ruling conflicts with the holdings of other courts that evidence of plaintiff's conduct "which heretofore was labeled as '*in pari delicto*' now is appropriate when it provides rebuttal to that plaintiff's allegations of causation of injury by defendant and resulting damages therefrom." *Pearl Brewing Co.* v. *Jos. Schlitz Brewing Co.*, 415 F. Supp. 1122, 1131 (S.D. Tex. 1976); *see Kestenbaum* v. *Falstaff Brewing Corp.*, 514 F.2d 690, 695 (5th Cir. 1975), *cert. denied,* 424 U.S. 943 (1976). And the Fourth Circuit is not alone in misconstruing the import of *Perma Life* to antitrust damages law, for other courts have struggled to accommodate the lessons of that case to basic causation concepts. *Compare Javelin Corp.* v. *Uniroyal, Inc.*, 546 F.2d 276 (9th Cir. 1976), *cert. denied,* 431 U.S. 938 (1977) (such evidence not relevant) *with Bernstein* v. *Universal Pictures, Inc.*, 517 F.2d 976, 982 (2d Cir. 1975) (such evidence may be relevant to show "equal fault"). *See generally* Handler & Sacks, *The Continued Vitality of In Pari Delicto as an Antitrust Defense,* 70 Geo. L.J. 1123, 1150-51 (1982) (noting conflict in the circuits over proper application of *Perma Life*).

In addition, the majority ruling compounds the confusion in the lower courts over the proper scope of damages trials in cases where the issue of liability (including fact of damage) is bifurcated from the issue of amount of damages—a widespread, virtually universal, practice in antitrust cases involving several or class plaintiffs.* The

* A bifurcation order, for example, was central to the dispute in the *Weyerhaueser* case, *see In re Plywood Antitrust Litigation, supra,* 655 F.2d at 636 (barring causation evidence at the damages trial after jury finding on fact-of-damage), and has occasioned various conflict-

(footnote continued on next page)

procedural convenience of bifurcation does not alter the statutory command that a plaintiff may recover only the damages sustained "by reason of" the antitrust violation. 15 U.S.C. § 15. The whole purpose of an antitrust damages trial following a fact-of-damage finding in the liability trial is to identify the *extent* of a plaintiff's antitrust injury: the "burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by [plaintiff's] proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969) (emphasis in original). Evidence that a plaintiff's claimed damages were directly caused by plaintiff's own actions—"by reason of" events *other than* the antitrust violation—is central to that inquiry.

Other circuits so hold. In *Knutson* v. *Daily Review, Inc.*, 664 F.2d 1120, 1121 (9th Cir. 1981), for example, the Ninth Circuit, which had previously ruled that plaintiffs had proven the fact of damage (548 F.2d 795, 813), upheld a judgment on remand which awarded *no* damages based on evidence that factors other than the antitrust violation had caused the claimed injury. And in *Haverhill Gazette Co.* v. *Union Leader Corp.*, 333 F.2d 798, 803 (1st Cir.), *cert denied*, 379 U.S. 931 (1964), the First Circuit, while vacating a damages award as inadequate, made clear that, at the

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ing views of the type of evidence admissible at a damage trial, *compare Terrell* v. *Household Goods Carriers' Bureau*, 494 F.2d 16, 21 (5th Cir.), *cert. dismissed*, 419 U.S. 987 (1974) (causation evidence not admissible at damages trial) *with Wall Products Co.* v. *National Gypsum Co.*, 357 F. Supp. 832, 835 (N.D. Cal. 1973) (causation evidence admissible).

damages trial on remand, the trier of fact was *not* bound by the interlocutory fact-of-damage finding to award *any* damages, if the evidence showed that the claimed damages were not caused by the antitrust violation.

This Court's guidance is needed to resolve the conflict over the import of *Perma Life* for antitrust damages cases, and, more generally, the conflict over the type of evidence which is admissible in a trial to determine the effects of an antitrust conspiracy. The Fourth Circuit's ruling renders Section 4 of the Clayton Act, not a remedial provision to repair the impact on competition of an adjudged violator's actions, but an insurance provision to be used by competitors like plaintiff to indemnify themselves threefold from the consequences of their own "reprehensible conduct." That ruling should be corrected, and the conflicts in the lower courts resolved.

III

The Fourth Circuit erroneously restricted the judicial power to regulate abuses of joint and several liability.

The third question on which we seek review is whether a court has the power to regulate abuses of joint-and-several liability by reducing an antitrust plaintiff's damages claim to eliminate damages attributable to the plaintiff's dealings with a settled co-conspirator.

As we have seen (p. 14 *supra*), plaintiff enjoyed a secret competitive edge over all other throwsters by virtue of its kickback arrangement with Leesona. After some

throwsters stopped paying royalties to Leesona, however, thereby ending plaintiff's edge, plaintiff joined other throwsters in an antitrust suit against Leesona based, as the trial court here noted, "on the same horizontal conspiracy" plaintiff later asserted against defendants in this case. App. B, JA59. Subsequently, after Leesona had been adjudged an antitrust violator for its kickback scheme but before trial of damages issues, plaintiff and Leesona settled: plaintiff gave up its claim against Leesona (whose share of the false twist machinery market during the pertinent period exceeded two-thirds) and plaintiff received in return only a sum equal to a portion of its attorneys' fees.

The trial court here, noting the "peculiar facts of this case," App. C, JA71, found inequity in allowing a massive shift of trebled damages when "the biggest textile company on earth [plaintiff] goes out and settles with perhaps the biggest textile machinery manufacturer on earth [Leesona]." App. F, JA93. Accordingly, relying on the defense of "claim reduction," the trial court held that it was "eminently fair" to reduce plaintiff's damages by eliminating the $14 million attributable to plaintiff's royalty payments to Leesona. App. C, JA73.

But the Fourth Circuit reversed, holding that, under this Court's decision in *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981), the federal courts are totally powerless to consider the fairness of an antitrust plaintiff's effort to shift damages among alleged joint wrongdoers, but must instead rigidly apply the rule of joint and several liability. 690 F.2d at 391-95; App. A, JA22-31.

The Fourth Circuit's ruling extends the effective reach of *Texas Industries* well beyond its grasp. The sole issue

in *Texas Industries* was whether the antitrust laws provide for a separate and independent right of action for contribution among joint tortfeasors. In concluding that such a right could not be implied from the treble-damages remedy, this Court made clear that the judiciary retained the power to "identify the scope of the remedy" embodied in the Clayton Act. 451 U.S. at 646. As *Texas Industries* explained, adoption of the rule of joint and several liability was one exercise of that power; as the trial court here understood, claim reduction to regulate abuses of that rule is but another manifestation of the same authority.*

The Fourth Circuit's reading of *Texas Industries* has direct consequences for every antitrust case alleging a horizontal price agreement. In such cases, each antitrust defendant faces the prospect of trebled damages based not only on his own actions but also on the actions of all others in the industry who are said to have joined in the agreement. This prospect, together with the growth of class and multi-plaintiff consolidated litigations, creates the risk that a single defendant may be exposed to industry-wide and crippling liabilities. Such a risk, unknown in other areas of antitrust law, vests the plaintiff with enormous powers to choose its adversaries, to exert tremendous pressure for settlement, to settle with those against whom plaintiff would prefer not to litigate, and to engage in selective pun-

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* *Cf. American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 102 S.Ct. 1935, 1949 n.1 (1982) (Powell, J., dissenting) (noting "inequitable result" of multi-million dollar damages judgment after plaintiff had settled with the principle tortfeasors).

In rejecting claim reduction, the Fourth Circuit relied also on the majority opinion in *Hydrolevel*. *See* 690 F.2d at 392-93; App. A, JA25-26. But *Hydrolevel* held only that a trade association could be liable for the actions of its member-agents, 102 S. Ct. at 1944-46, not that a court was without power to reduce a plaintiff's damages.

ishment. The exercise of those powers to capture trebled damages may achieve social benefits in some cases; in others, however, the result is abuse of joint and several liability and a net social cost. Claim reduction offers a safeguard against the latter situation.

In denying the federal courts the authority to adopt claim reduction, the Fourth Circuit ignored the *judicial* evolution of law that enabled plaintiffs to shift liability in the first place. It was a court, not Congress, that decided to engraft joint-and-several liability on Section 4 of the Clayton Act. It was a court, not Congress, that decided that a release of one jointly-liable conspirator released all such conspirators, and it was a court, not Congress, that later altered that rule to allow a releasor to preserve his claim against nonsettling conspirators. Without these *judicial* decisions, antitrust plaintiffs would have no right to sell one claim cheaply and then seek to recover the very same claim from another. To perceive a reservoir of judicial authority to implement claim reduction is to recognize only a power to regulate the effects of prior judicial determinations.

Claim reduction fully preserves the fundamentals animating the prior judicial determinations. Joint and several liability is designed only to assure that "plaintiffs will be *able* to recover damages from some, if not all, participants," *Texas Industries, Inc.* v. *Radcliff Materials, Inc., supra,* 451 U.S. at 646 (emphasis added); the objective is to preserve plaintiff's ability to recover damages in the event some participants are judgment proof or not amenable to process, *see Atlanta* v. *Chattanooga Foundry &*

Pipeworks, 127 F. 23, 26 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906). That objective is fully satisfied when, as here, plaintiff is in fact able to recover from all participants but decides to release one. The release may entitle plaintiff to proceed against the remaining participants, *see Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 347 (1971), but the release cannot and does not *bind* a court to impose on the remaining participants the full impact of the damages attributable to the settled tortfeasor. The courts, through interpretation and application of Section 4 of the Clayton Act, are alone empowered to determine plaintiff's entitlement to those damages.

Claim reduction does no violence to the aims of Section 4: defendants here would remain fully liable for treble the overcharge, if any, on plaintiff's payments to defendants. But nothing in the text of Section 4 requires that defendants bear as well the full brunt of industry-wide liability. And when, as here, that burden is sought to be imposed as a result of a settlement between Leesona (plaintiff's supplier and a competitor of defendants) and plaintiff (also a competitor of defendants), the courts are not disarmed to prevent an abuse of judicial processes that produces an unfair and inequitable result. Because the Fourth Circuit's contrary ruling rests on an overly-broad reading of a decision of this Court, certiorari is necessary to make clear that the federal courts retain the power to prevent such abuses through interpretation and application of Section 4.

IV

In allowing a party to recover damages for the claim of a nonparty, the Fourth Circuit denied petitioners due process.

The final question on which we seek this Court's review raises not a need to clarify the scope of a statutory remedy, or to resolve conflicts in its application, but to repair an egregious and unprecedented deprivation of due process.

The facts are these: When this consolidated action began in 1969, the Fedelon Throwing Corporation was a separately-incorporated, wholly-owned subsidiary of plaintiff and a customer of Leesona (but not of defendants). Fedelon had once paid royalties to Leesona, but, when plaintiff and other throwsters sued defendants, Fedelon did not join the suit. In 1970, Fedelon was merged into plaintiff. In the years following the merger, plaintiff gave defendants no notice of any claim relating to Fedelon. During the liability trial in 1976-77, there was no whisper of Fedelon. Only at the damages trial *in 1980* (long after defendants' liability to plaintiff had been adjudged) did plaintiff for the first time mention Fedelon and claim Fedelon's royalty payments to Leesona—of which defendants knew nothing—as damages to be trebled (amounting to almost $2 million).

The statute of limitations on the Fedelon claim had of course long expired (15 U.S.C. § 15b). The district court, consequently, held that plaintiff could not now claim Fedelon royalties as damages. But the Fourth Circuit reversed, ruling that, since Fedelon had paid royalties to Leesona and thus must have had the "same" claim as plaintiff, no "actual prejudice" resulted from the lack of notice. 690 F.2d at 390; App. A, JA20.

That ruling, we submit, stands the Constitution on its head. Without a summons, without notice, without discovery, without evidence, without a trial, it is factually impossible and constitutionally repugnant to surmise that Fedelon had a valid claim against defendants, or that defendants had no unique defenses to that claim. By virtue of the merger of Fedelon into plaintiff, plaintiff acquired only a *potential* cause of action. That potential claim could not ripen into an *actual* cause of action unless and until plaintiff asserted the claim by notice. Plaintiff did not give such notice; it did not assert the claim. Defendants, in consequence, were never given the opportunity to take discovery of Fedelon, nor to assert defenses against it. The validity of Fedelon's claim and the existence of defenses remain an utter mystery because—and only because—plaintiff gave no notice.

The most fundamental and abiding tenet of our jurisprudence is that a party cannot be deprived of property without notice and an opportunity to be heard. " 'Parties whose rights are to be affected are entitled to be heard; and in order that they enjoy that right they must first be notified.' " *Fuentes* v. *Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin* v. *Hale*, 68 U.S. [1 Wall] 223, 233 (1863)). "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan* v. *United States*, 304 U.S. 1, 18 (1938). Actual prejudice inheres in the denial of notice, and no constitutionally proper judgment may be entered against petitioners absent an opportunity to be heard on Fedelon's claim. *See Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1961) (vacating judg-

ment entered without notice, notwithstanding the merits of the claim); *Wuchter* v. *Pizzutti*, 276 U.S. 13, 24 (1928) (same).

The Fourth Circuit's ruling threatens unpalatable consequences that extend far beyond the injustice of this case. Civil defendants—not only antitrust, but any civil defendant—will be at constant risk that a corporate plaintiff has acquired potentially comparable but unasserted claims. And the plaintiff will have every incentive *not* to assert a subsidiary's claim, lest the notice of the claim expose the subsidiary to discovery and defenses.

Most fundamentally, a defendant's right to due process will depend on his ability to show, without opportunity for discovery or trial, that discovery and trial would have made a difference. That unprecedented ruling cannot be condoned.

Conclusion

This case began almost fourteen years ago. The liability trial consumed the better part of eight months (resulting in a liability judgment against defendants which the trial court later called "a very close case" [App. B, JA54]). The damages trial, even as limited, lasted three weeks. There have been no fewer than seven appeals to the Fourth Circuit, and two prior petitions for certiorari.

Unless this Court now intervenes, the parties will return to the district court for still another damages trial under a clearly improper rule of law, with the prospect of further appeals ahead.

We ask this Court to grant certiorari in order to resolve the issues here raised and to prevent further needless waste of judicial resources.

Dated: February 23, 1983
New York, New York

Respectfully submitted,

Simon H. Rifkind
Jay Topkis
(Counsel of Record)
Steven B. Rosenfeld
Gerard E. Harper
Paul, Weiss, Rifkind, Wharton & Garrison
345 Park Avenue
New York, New York 10154
(212) 644-8000

Of Counsel:

Howard E. Manning, Sr.
Manning, Fulton & Skinner
801 Wachovia Bank Building
Raleigh, North Carolina 27602

Nos. 82-1410

IN THE

Supreme Court of the United States

October Term, 1982

MILLIKEN RESEARCH CORPORATION and CHAVANOZ, S.A.,
Petitioners,

v.

BURLINGTON INDUSTRIES, INC., *et al.*,
Respondents.

and

MILLIKEN & COMPANY,
Petitioner,

v.

BURLINGTON INDUSTRIES, INC., *et al.*,
Respondents.

JOINT APPENDIX TO PETITIONS FOR WRIT OF CERTIORARI

SIMON H. RIFKIND
JAY TOPKIS
(*Counsel of Record*)
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 Park Avenue
New York, New York 10154
(212) 644-8000

MANNING, FULTON & SKINNER
801 Wachovia Bank Building
Raleigh, North Carolina 27602
(919) 828-8295

Attorneys for Petitioners
Milliken Research Corporation and
Chavanoz, S.A.

GRIFFIN B. BELL
(*Counsel of Record*)
KING & SPALDING
2500 Trust Company Tower
Atlanta, Georgia 30303
(404) 572-4600

Attorneys for Petitioner Milliken & Company

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Opinion of the Court of Appeals
[Reported at 690 F.2d 380]

BURLINGTON INDUSTRIES, INC. and
MADISON THROWING COMPANY, INC.,
Plaintiffs-Appellees/
Cross-Appellants,

v.

MILLIKEN & COMPANY, MILLIKEN RESEARCH CORPORATION,
CHAVANOZ S.A., ASA, S.A. AND ARCT, INC.,
Defendants-Appellants/
Cross-Appellees.

THE DUPLAN CORPORATION, *et al.*,
Plaintiffs,

v.

DEERING MILLIKEN, INC., DEERING MILLIKEN RESEARCH CORPORATION, MOULINAGE ET RETORDERIE DE CHAVANOZ, ATELIERS, ROANNAIS DE CONSTRUCTIONS TEXTILES, and ARCT, INC.,
Defendants.

Nos. 81-1823 to 81-1825 and 82-1240

Appendix A

Appeal from the United States District Court for the District of South Carolina, at Spartanburg. Franklin T. Dupree, Jr., Chief Judge.

Argued May 6, 1982 Decided September 23, 1982

Before WINTER, Chief Judge, BUTZNER and HALL, Circuit Judges.

Jay Topkis (Simon H. Rifkind, Steven B. Rosenfeld, Gerard E. Harper, Mary Lu Bilek, Paul, Weiss, Rifkind, Wharton & Garrison on brief); Griffin Bell; (Howard E. Manning, Sr., Manning, Fulton & Skinner on brief) for Appellants; David L. Foster (Michael C. Lambert, James J. Calder, Jonathan P. Wolfert, Willkie Farr & Gallagher on brief); William K. West, Jr. (W. Warren Taltavull, Cushman, Darby & Cushman on brief); McNeill Smith (Michael R. Abel, Smith, Moore, Smith, Schell & Hunter on brief) for Appellees.

WINTER, Chief Judge:

[383] This is an antitrust case in which the district court found a continuing horizontal antitrust conspiracy to stabilize and maintain production royalties on false twist machines and to monopolize the United States market for these machines.[1] The core of the conspiracy was a 1964

1. As originally instituted, the litigation involved charges of a vertical antitrust conspiracy, patent misuse, patent validity and infringement and nonpayment of royalties. These aspects of the case have all either been finally decided or superseded by the finding of the horizontal conspiracy.

settlement agreement of certain patent litigation then pending between Leesona Corporation (a nonparty to the present case) and defendants which had the effect, as found by the district court, of stabilizing and maintaining the royalties charged by the coconspirators. After we modified the district court's determination of liability to include all defendants, *Duplan Corp.* v. *Deering Milliken, Inc.*, 594 F.2d 979 (4 Cir. 1979), *cert. denied,* 444 U.S. 1015 (1980), the district court decided the issue of damages. Initially it awarded plaintiffs treble damages in the aggregate sum of $20,902,005.39, and all parties appealed. While the appeals were pending, we remanded the case to the district court at its request to enable it to reconsider its ruling, and the district court reduced its award to $7,462,211.67. The previous appeals from the damage award and an appeal from the order reducing damages are now before us. We vacate the award and remand the case for further proceedings.

I.

The facts of the case were extensively found by the district court prior to the previous appeal. *Duplan Corp.* v. *Deering Milliken, Inc.,* 444 F. Supp. 648 (D.SC. 1977). We will repeat them only insofar as they bear on the issues before us and then only in connection with the issues to which they relate. From the several appeals, there are seven issues that we must consider:

1. Whether the district court properly applied the measure of damages and correctly excluded evidence proffered by defendants as to the price plaintiffs would have paid for false twist equipment absent the price-fixing conspiracy.

2. Whether defendants should have been permitted to prove, in the damages phase of the trial, that plaintiffs participated in the price-fixing conspiracy and are therefore barred from all recovery.

3. Whether plaintiffs are estopped from recovering royalty-based damages because of their role in other litigation which resulted in a ruling that Leesona's patents were valid.

4. Whether the district court properly applied the statute of limitations to plaintiffs' antitrust claims.

5. Whether plaintiff Madison Throwing Company, Inc. (Madison) may recover damages sustained by a wholly-owned subsidiary of Madison which was merged into Madison during the pendency of the litigation.

6. Whether the district court erred in calculating the value of support services provided to plaintiffs by defendant Deering Milliken Research Corporation (DMRC) and Leesona Corporation (Leesona) during the damages period, and in excluding that value from the royalty-based damages before trebling.

7. Whether the district court erred in recognizing a defense of "claim reduction," whereby it reduced the initial award against defendants by excluding treble damages attributable to Leesona on the grounds that plaintiffs had settled with Leesona in a related case.

We address these issues seriatim.

II.

To approach the issue of whether the measure of damages recoverable by plaintiffs was properly applied and to

consider [384] whether the district court erred in excluding evidence proffered by defendants on the matter of damages, it is necessary to describe the context in which these questions arise.[2]

Defendant Moulinage et Retorderie de Chavanoz (Chavanoz) owned patents covering specific features of false twist machinery and thus had the right to *make, use* and *sell* machinery incorporating the patented features. It divided up its rights by licensing defendant Ateliers Roannais de Constructions Textiles (ARCT-France) to *make* and *sell* patented machines, while licensing DMRC to *use* the patented machines in the United States. ARCT-France issued a sublicense to Whitin Machine Works (Whitin) enabling it to sell the machinery in the United States. Whitin fixed its own price for the machines it sold, but agreed to sell only to purchasers approved by Chavanoz or DMRC. At a later date, ARCT, Inc. (ARCT) was incorporated to be the exclusive American distributor of machines manufactured by ARCT-France. Like Whitin, ARCT sold machines only to purchasers who were licensed to use them. DMRC issued sublicenses to throwsters to enable them to operate the machines purchased from Whitin and ARCT. DMRC required its use sublicensees to pay royalties based on the amount of yarn produced on the machines, and DMRC was required by the provisions of its license from Chavanoz to pay a portion of these production royalties to Chavanoz.

2. In the instant case, the fact of damage, an essential ingredient to a showing of antitrust liability, was conclusively established in the liability phase of the trial. We are concerned now only with the measure of actual damages.

Appendix A

Plaintiffs Burlington Industries, Inc. (Burlington) and Madison[3] are throwsters who purchased ARCT machines from Whitin and obtained use sublicenses from DMRC. They thus paid Whitin a given sum for the purchase of the machines and DMRC a royalty for the use of the machines. A portion of what was collected by DMRC was remitted to Chavanoz.

At the time that Chavanoz's patented device was introduced into the American market, Leesona was the sole established competing manufacturer and distributor of false twist equipment. It, too, charged its throwster customers a production royalty for the use of its machines. The royalties charged by Leesona were roughly comparable to those charged by DMRC. Leesona sued Whitin for patent infringement in 1960, and the suit was settled in 1964 when the competing patent owners exchanged covenants not to sue each other or their respective licensees. In the liability phase of the present case, the district court found that the effect of the settlement was to fix royalties on false twist equipment to the detriment of plaintiffs. Having been affirmed in a previous appeal, that finding and the resulting liability are no longer at issue.

Prior to the trial on damages, the district court, on motion of the plaintiffs, ruled on the scope of the damages inquiry. It held that "proof of the payment of royalties by the plaintiffs following the illegal combination found to have existed between DMRC and Leesona sufficed to establish the fact of damage, and . . . proof of the amount of such royalties . . . will suffice to establish a prima facie case

3. When this litigation began, Madison was Burlington's wholly-owned subsidiary. During the litigation Madison was merged into Burlington.

of actual damages subject to diminution by the value of any considerations received by the plaintiffs in return for the royalties such as 'support services' allegedly furnished plaintiffs by DMRC during the damages period.'' In pursuance of that concept, the district court awarded Burlington and its subsidiary Madison, for the various periods of liability, treble the royalties they had paid to DMRC and Leesona, diminished only by the value of support services furnished by DMRC and Leesona and an amount received by Burlington from Leesona in settlement of separate but related litigation. In accordance with our mandate in the prior appeal, the judgment was entered against all defendants. Although Leesona is not a party to the case, [385] royalties which plaintiffs paid to it were treated as an item of damage against the other defendants on the theory that they were coconspirators with Leesona and hence were jointly and severally liable for the entire damage to the victims of the conspiracy.

This appeal presents no dispute about the governing principle for the measurement of damages in a price-fixing case. Plaintiffs are entitled to recover the overcharge stemming from the illegal combination—*i.e.*, the difference between the prices actually paid and the prices that would have been paid absent the conspiracy. *See, e.g., The Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 489 (1968); *American Crystal Sugar Co.* v. *Mandeville Island Farms, Inc.*, 195 F.2d 622, 625 (9 Cir.), *cert. denied*, 343 U.S. 957 (1952); 15 J. von Kalinowski, *Antitrust Laws and Trade Regulation* ¶ 115.03[3], at 115-27 (1982); *see also Phillips* v. *Crown Central Petroleum Corp.*, 602 F.2d 616, 632-33 (4 Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980). The

district court recognized this abstract measure. It ruled, however, that in the circumstances of this case the entire amount of royalties paid to the coconspirators constitutes an overcharge and hence is recoverable as damages. Having made this ruling, the district court saw no need for further inquiry into the amount which plaintiffs would have paid for the purchase and use of false twist machinery in the absence of the royalty-maintenance conspiracy. It permitted discovery only as to the amount of royalties actually paid and the value of off-setting support services, and it refused defendants' offer to prove that the actual royalties paid did not in fact equal the amount of the overcharge resulting from the conspiracy.[4]

The sole precedent directly on point is contrary to the district court's ruling. *Alden-Rochelle, Inc.* v. *American Society of Composers, Authors & Publishers*, 80 F. Supp. 888 (S.D.N.Y. 1948), concerns a claim for damages arising from ASCAP's licensing program, which had been held to violate the antitrust laws. Plaintiffs argued that, because the licensing scheme constituted unlawful price-fixing, they were entitled to recover all of the license fees which they

4. Defendants offered to substantiate this theory by showing that if Leesona had lost its right to collect royalties, it would have increased the lump-sum purchase price for its machines, because "[t]he price of our machinery has always been a combination of machine price and royalty"; that Leesona could have collected royalties on other patents even if the patents safeguarded by the conspiratorial settlement had been invalidated; that market demand was so strong that Leesona could have raised prices by as much as 20%; that DMRC could have exacted a premium even if Leesona's patents had been invalidated, since DMRC's machines were cheaper to operate than those of Leesona and therefore supported a higher royalty; that DMRC and Chavanoz could have extracted paid-up royalties to replace production royalties, in which case Whitin would have been forced to raise its prices; and that price increases by defendants would not have induced substantial foreign competition.

had paid. This theory was rejected with the statement that an antitrust plaintiff cannot rest on a showing of injury, but must also demonstrate the basic facts from which a court may reasonably approximate the amount of his damages. *See id.* at 898. In words that are striking for their implications in the present case, the *Alden-Rochelle* court concluded: "A plaintiff does not satisfy that burden by offering no proof at all, except what he paid the violator." *Id. Cf. Yoder Brothers, Inc.* v. *California-Florida Plant Corp.*, 537 F.2d 1347, 1376 & n.29 (5 Cir. 1976) (upon proof of an antitrust conspiracy by patent holders, the finder of fact should consider both the "total amount of royalties paid" and evidence of what a " 'reasonable' royalty rate" would have been), *cert. denied,* 429 U.S. 1094 (1977).

Both legal and economic logic support the rule articulated in *Alden-Rochelle* and require its application here. As the district court indicated in the liability phase of this case, the payment of production royalties to DMRC and Leesona "constituted in effect a part of the purchase price for machines." [386] *Accord, In re Yarn Processing Patent Validity Litigation,* 541 F.2d 1127, 1136 (5 Cir. 1976), *cert. denied sub nom. Lex Tex Ltd.* v. *Universal Textured Yarns, Inc.*, 433 U.S. 910 (1977). Implicit in the notion that royalties were essentially deferred components of a comprehensive sales price, which also included an initial lump-sum payment, is the possibiilty that the lump sum might have been increased to make up for a loss of royalties. This is particularly clear in Leesona's case, since it directly charged manufacturers of its equipment a royalty on manufacturing licenses and throwsters a royalty on use licenses. Hence, if Leesona had been unable to maintain its use roy-

alties, it might have responded by increasing manufacturing royalties on its initial sales price, subject only to market constraints. *See id.* The same factors were potentially at work in Chavanoz's licensing and distribution scheme. ARCT-France, ARCT, Whitin, and DMRC were all branches of a single stem springing from the patent owner, Chavanoz. A portion of all royalties, together with a portion of the lump-sum purchase price paid by a throwster for false twist equipment, ultimately was paid to Chavanoz. If Chavanoz had lost the ability to share in deferred compensation in the form of royalties, it would have had a strong economic incentive to increase its portion of the lump-sum initial purchase price. Whether and to what extent it could have done so are difficult factual issues which have not yet been determined and which cannot be determined without a full trial.

The district court found in the liability phase of the proceedings that the coconspirators' respective royalty programs were economically interdependent, and that defendants entered into a collusive settlement of their patent litigation precisely because they knew that an adjudication ending Leesona's power to charge royalties would also, by altering the terms of competition, have destroyed the ability of Chavanoz and DMRC to command royalties. Those findings established the *fact* of injury, but it is an untenable leap of logic to suggest that they establish the *extent* of the damages. A full-fledged damages trial may reveal that the coconspirators did not in fact possess the leverage to recoup lost royalties in another form. But the accuracy of that conclusion turns on a host of market factors which have yet to be explored. Without a test of the evidence,

the plaintiffs' damages cannot fairly be equated with the royalties actually paid.

We hold that the district court erred in using the actual royalties paid as the measure of damages without considering whether royalties or some other compensation would have been payable absent the illegal conspiracy. Accordingly, we vacate the damage award and remand the case for further proceedings. On remand, the district court should permit reasonable discovery and conduct a thorough factual inquiry into the difference, if any, between the overall price which throwsters were required to pay in the context of the royalty-maintenance conspiracy and the overall price they would have paid in an untainted market.[5] We recognize, however, that antitrust damages can only be approximated and that antitrust coconspirators should be prevented from unfairly exploiting the complexity of factual issues occasioned by their unlawful conduct. *See, e.g., Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927). Hence, we further hold that the royalties actually paid may serve as a prima facie estimate or "yardstick" of damages, which defendants must overcome with persuasive evidence. *Cf. Phillips* v. *Crown Central Petroleum Corp.*, 602 F.2d at 632-33; *Yoder Brothers, Inc.* v. *California-Florida Plant Corp.*, 537 F.2d at 1376 & n.29. But defendants must be afforded the opportunity to prove that the actual royalties paid do not in fact equal the overcharge which is the true measure of plaintiffs' damages.

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5. We, of course, have no occasion to pass on the admissibility or persuasiveness of particular items of evidence contained in defendants' proffer. Those are matters for the district court to decide on remand.

III.

[387] In the damages aspect of the trial, defendants sought to prove that Burlington (a) secretly obtained the use of unlicensed false twist equipment and thereby gained a cost advantage over its competitors, who were obliged to pay royalties to defendants; (b) caused the supplier of the unlicensed equipment to settle a patent infringement suit brought by Leesona and to become a licensee of Leesona; and (c) thereafter preserved its cost advantage by inducing the supplier to kick back to Burlington royalties which the supplier received by virtue of its license. Defendants contended that such proof might bar all recovery and would at least require the district court to exclude from any award the royalties which Burlington paid Leesona. The district court rejected defendants' proffer but excluded the kickbacks received by Burlington from the damage award before trebling.

In our view, the district court ruled correctly. In essence defendants raise the affirmative defense of in pari delicto. *See Columbia Nitrogen Corp.* v. *Royster Co.*, 451 F.2d 3, 15-16 (4 Cir. 1971).[6] The nature of that defense

6. In *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), the opinion for the Court indicated that the in pari delicto defense is unavailable in antitrust litigation. *See id.* at 140. Five concurring and dissenting Justices, however, either rejected this view or accepted it only with substantial qualification. Under the concurring and dissenting opinions in *Perma Life Mufflers*, this circuit continues to recognize a narrow version of the defense. *See Columbia Nitrogen Corp.*, 451 F.2d at 15-16. *See also* 15 J. von Kalinowski, *supra*, § 109.02 (taking the view that the in pari delicto defense remains viable after *Perma Life Mufflers*). *But see Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, —— U.S. ——, 72 L. Ed. 2d 330, 341-42 (1982) (citing *Perma Life Mufflers* for the proposition that broad common-law defenses should not be permitted to hamper private rights of action under the antitrust laws).

is not altered by the fact that defendants cast it in the language of "damage causation," arguing that Burlington caused its own injury and is thus precluded from recovering damages. Significantly, successful assertion of the in pari delicto defense does not merely reduce a plaintiff's compensable damages; instead, it bars the plaintiff from any recovery. *See id.* at 16. Thus the defense goes to the issue of liability—an issue finally settled in this case—rather than to the extent of the damages. We hold therefore that proof of Burlington's alleged misconduct was not timely and was properly excluded. We see no reason to reopen the liability phase of the case at this late date.

Even if the in pari delicto defense could properly be raised in the damages phase of the trial, defendants could not successfully avail themselves of the doctrine. Proof that Burlington contrived to elude defendants' royalty exactions and thus secured a competitive advantage in the throwster industry is not enough to establish the defense. Rather, the defense would require proof that Burlington "mutually participate[d] in the formulation and execution of the scheme and [bore] equal responsibility for the consequent restraint of trade." *Columbia Nitrogen Corp.*, 451 F.2d at 15-16. Defendants have produced no proof in the liability phase of the trial that Burlington played any role in the collusive settlement by which they fixed royalties and violated the antitrust laws; nor do they allege it now. These omissions are fatal to the in pari delicto defense, especially since that doctrine retains only narrow application in the antitrust setting after *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968). *See id.* at 140 ("once it is shown that the plaintiff did not aggres-

sively support and further the monopolistic scheme as a necessary part and parcel of it, his understandable attempts to make the best of a bad situation should not be a ground for completely denying him the right to recover which the antitrust acts give him"); *id.* at 145-46 (White, J., concurring); *see also id.* at 154-55 (Harlan J., concurring and dissenting).

We emphasize that, to the extent that Burlington was able to reduce its injuries by obtaining a price reduction in the [388] form of kickbacks of royalties earned by its supplier as a licensee of Leesona, these savings were properly deducted from the damage award before trebling. *See id.* at 140 (opinion for the Court). Defendants offered no more precise method of valuing the benefits gleaned by Burlington, and this measure suffices under the rule of approximation which is applicable to antitrust damages. *See generally* Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-65 (1946).

It has been suggested that defendants should be permitted to prove Burlington's alleged misconduct as part of the damages phase of the case because Burlington's scheme was distinct from the conspiracy between defendants which was the subject of the liability trial. If Burlington's misconduct other than direct participation in the antitrust conspiracy is asserted as a defense, defendants can only be understood as raising the equitable defense of unclean hands. It is well settled that unclean hands is no bar to antitrust recovery. *See Kiefer-Stwerat Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951); *Perma Life Mufflers, Inc.*, 392 U.S. at 138; *id.* at 143 (White, J., concurring); *id.* at 154-55 (Harlan, J., concurring and dissenting).

If, as is far from clear, Burlington's alleged conduct amounted to a violation of law, Burlington may be vulnerable to prosecution or held liable by a party injured as a result of the violation. But defendants cannot avoid liability to Burlington for their own antitrust conspiracy by alleging that Burlington is culpable for a distinct infraction.

IV.

Leesona's patent infringement suit against Burlington's supplier of unlicensed false twist equipment terminated in a consent decree, entered in 1963, which recited the validity and infringement of Leesona's patents. Although Burlington was not a party to that suit, the district court found that it "orchestrated" the settlement which led to the consent decree. Defendants argue that since plaintiffs earlier caused an adjudication of the validity of Leesona's patents, the doctrine of collateral estoppel now precludes them from employing a damages theory which assumes that the patents would have been invalidated in the absence of conspiracy.

This issue may become moot if, on remand, defendants prove that royalties are not a reasonable measure of damages in the first place. The question calls for decision now, however, since we have held that royalties may be used as prima facie evidence of damages, subject to rebuttal.

We reject defendants' estoppel argument for two reasons. First, the validity or invalidity of the patents is not an essential element of defendants' proven antitrust violation. The conspiracy to fix royalties would have been unlawful even if the patents giving rise to the royalties were

valid. The conspiratorial settlement was illegal, not because it forestalled a legal challenge to the patents, but because it served as a vehicle for collusive restraint of trade.

Second, the consent decree which defendants contend gives rise to an estoppel was rendered in 1963; the conspiratorial settlement between defendants and Leesona was not effected until 1964. Plaintiffs' urging the validity of Leesona's patents in 1963 scarcely estops them from arguing that the patents were misused in a subsequent antitrust violation. Thus, even if plaintiffs may not argue that the patents were always invalid, they may claim royalty-based damages under the Clayton Act on the theory that the patents became unenforceable in 1964 because of their misuse in an antitrust conspiracy.

V.

In the liability phase of this case, the district court correctly ruled that plaintiffs would be entitled to recover "all damages which plaintiffs may show have been sustained within four years preceding their suits resulting solely from acts of the defendants committed during the four-year [389] period." *See* 15 U.S.C. § 15b (1976). We turn now to the application of that rule in the particular circumstances of this litigation.

In the thirty-seven separate actions which were consolidated and resulted in the case before us, Burlington first pleaded an antitrust violation on February 16, 1970, in a counterclaim to a suit filed against it by DMRC on December 19, 1969. DMRC had sued for Burlington's alleged breach of its license agreement with DMRC and had also

prayed for a declaratory judgment that the agreement was enforceable. Burlington's answer both asserted an independent antitrust counterclaim and raised the alleged antitrust violation as a defense to enforcement of the agreement. DMRC filed an identifical suit against Madison on January 29, 1970, and Madison answered on February 23, 1970, with an antitrust counterclaim and an antitrust defense similar to those asserted by Burlington. The district court held that Burlington's and Madison's antitrust claims related back to the dates of DMRC's respective complaints. It therefore permitted Burlington to recover for the period beginning four years prior to December 19, 1969, and Madison to recover for the period beginning four years prior to January 29, 1970.

We think that the district court was correct in its ruling. Burlington's and Madison's antitrust claims against DMRC arose out of the very transaction which was the subject matter of DMRC's complaint—namely, the licensing agreement imposed by DMRC. Thus, the antitrust claims were compulsory counterclaims under Rule 13(a), F. R. Civ. P. In our view, *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U.S. 661 (1944), does not require a different conclusion. Justice Douglas's opinion in that case treated antitrust and patent misuse claims as merely permissive counterclaims in response to a complaint for patent infringement. *See id.* at 671. The opinion has been read narrowly in this respect, and its continuing validity is open to serious question. *See, e.g., United States* v. *Eastport Steamship Corp.*, 255 F.2d 795, 805 (2 Cir. 1958); *Martino* v. *McDonald's System, Inc.*, 432 F. Supp. 499, 505 (N.D. Ill. 1977), *aff'd*, 598 F.2d 1079 (7 Cir. 1979); 3 *Moore's Federal Prac-*

tice ¶ 13.13, at 13-306 n.22 (2d ed. 1982); 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1412, at 61-64 (1971). In *Mercoid,* moreover, unlike the instant case, the complaint did not demand a declaratory judgment on the issue of the enforceability of the patents or of any license agreement under which those patents were licensed. *Mercoid* is thus distinguishable, even if it remains good law.

Unlike Rule 15(c), Rule 13(a) contains no mention of relation back. Nonetheless, the better view holds that "the institution of plaintiff's suit tolls or suspends the running of the statute of limitations governing a compulsory counterclaim." 6 C. Wright & A. Miller, *supra,* § 1419, at 109 (footnote omitted).

VI.

Prior to the commencement of this suit, plaintiff Madison had a wholly-owned subsidiary named Fedelon Throwing Corporation (Fedelon). Fedelon was never a party to this litigation, but it was merged into Madison during the liability phase of the trial. During the limitations period applicable to Madison's antitrust claims, Fedelon paid Leesona approximately $600,000 in royalties. In computing damages, the district court refused to make any award to Madison on account of injuries to Fedelon. We think that this was error.

Defendants concede that, under state law, Madison succeeded automatically to the claims of its merged subsidiary and was entitled to sue on those claims in its own name. However, they note that some state courts require a consolidated company, suing on the claim of a constituent company, to plead "performance of conditions precedent

to its'' consolidation. 15 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 7179, at 327 (rev. perm. ed. 1973) (footnote omitted). And they insist that, as a matter of due process, Madison was required to serve explicit notice that part of [390] its damages claim was derived from Fedelon.

Under the federal rules, an affirmative pleading need set forth only ''a short and plain statement of the claim showing that the pleader is entitled to relief.'' Rule 8(a)(2), F. R. Civ. P. The essential purpose of Rule 8 is to afford ''the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.'' 5 C. Wright & A. Miller, *supra,* § 1215, at 109-110 (footnote omitted). In pursuit of that goal, the rule eschews needless technicalities. *Id.* at 109. By this standard, the controlling question would appear to be whether Madison worked any significant prejudice on defendants by neglecting to give them special notice of Fedelon's claims.

Defendants argue strenuously that they were unfairly surprised by Madison's failure to make clear, until the damages phase of the trial, that it was seeking damages for Fedelon's royalty payments. They insist that such disclosure was required before the adjudication of liability to afford them a real opportunity to defend or compromise these claims. Defendants maintain that they cannot be charged with prior knowledge of Fedelon's royalty payments, since those monies were not paid to them but rather to Leesona. They note, moreover, that the pleadings were inconsistent in the treatment of subsidiaries which were merged into a named plaintiff during the litigation: just

as Fedelon was a subsidiary of Madison, Madison was a subsidiary of Burlington; unlike Fedelon, however, Madison was named as a plaintiff, and it remained a party even after it was merged into Burlington. *See* note 3 *supra*.

These arguments demonstrate no actual prejudice. The liability phase of the trial did not require plaintiffs to separate out their various items of damage. Instead, it focused primarily on the relationship among the various defendants. There is thus no reason to believe that defendants could have tailored any defenses specifically against Fedelon. Rather, the defenses which would have been available against Fedelon were the very ones which defendants asserted without success against the named plaintiffs. It must be emphasized, moreover, that Fedelon was wholly owned by Madison. As a practical matter, defendants' chances of compromising Fedelon's claims were no better than their chances of settling with Madison.

It may well have been better practice for Madison to give specific notice of Fedelon's claims. In some circumstances, the failure to do so would undoubtedly be prejudicial. For example, if a corporate litigant filed suit and then bought up the dormant claims of other entities to save them from being time barred, the defendant could justifiably cry foul. But no such abuse is apparent here. We therefore hold that Madison may recover for injuries to Fedelon sustained during the period not barred by limitations.

VII.

As we have stated in Part II, the district court, in fixing the standard by which damages would be assessed against

defendants, left open the possibility that royalty-based damages would be reduced "by the value of any considerations received by the plaintiffs in return for the royalties such as 'support services' allegedly furnished plaintiffs by DMRC during the damages period." In the damages trial which ensued, the defendants presented evidence that they provided substantial support services. DMRC offered evidence that it provided machine start-up and operator training, development of processing specifications, physical testing of yarns and fabrics, and other technical assistance. There was also evidence that Leesona continuously rendered technical services to its false twist machinery customers, primarily with respect to the mechanical features and operation of its machines.

Defendants' evidence of the extent of the services they provided and their worth was sharply contested by plaintiffs. The memorandum opinion of the district court demonstrates, not only that it was fully cognizant of the conflict, but also that it gave careful consideration to the evidence presented by both sides. On the basis of all of the [391] evidence, the district court concluded that "the defendants are entitled to a credit of ten per cent of the royalties paid DMRC and five per cent of the royalties paid Leesona by Burlington and Madison, the same to be deducted from the amounts of the royalties paid before trebling." Applying this method, the district court valued the relevant services provided by DMRC at $276,378.21 and those provided by Leesona at $171,147.14.

We affirm this aspect of the damages case. The support services could properly be taken into account in measuring plaintiffs' injury, and the district court's findings as to

the extent and worth of the services are not clearly erroneous.[7]

It should be noted that we review this aspect of the district court's ruling because of our holding that the royalties actually paid may serve as a prima facie estimate of damages. If, after the evidentiary hearing that we require, royalties are ultimately adopted by the district court as the proper measure of damages, they should be reduced by the value of the support services. But if another measure of damages is employed, the value of support services should be considered as affecting the price that plaintiffs would reasonably have been required to pay absent the illegal conspiracy.

VIII.

The reduction of the judgment from $20,902,005.39 to $7,462,211.67 occurred because the district court ultimately decided to embrace and apply the defense of "claim reduction." We turn now to consideration of this defense.

Burlington did not join Leesona in this action. Burlington, however, had earlier sued Leesona in a separate suit based upon the same antitrust theories and damages that are presented in the instant case. Burlington settled that litigation for the sum of $789,638.82.

In its original judgment, the district court deducted the amount that Burlington received in settlement from Leesona from the damages awarded Burlington against defend-

7. Plaintiffs argue that if any set-off for support services was appropriate, the deduction should have been made after trebling the damages. This argument, however, is inconsistent with the basic premise that plaintiffs cannot claim injury to the extent that they received value in exchange for the royalty payments.

ants here. This adjustment was made after trebling Burlington's total damages. In effect, then, the original judgment permitted Burlington to recover everything it had paid to Leesona (less the adjustment for support services), as well as DMRC, but it precluded double recovery of settlement proceeds actually received from Leesona. When the district court amended the judgment to give effect to the defense of claim reduction, it eliminated all recovery of sums paid to Leesona. This, of course, obviated the question of any credit for the amount Burlington received in the Leesona settlement.

We think that the district court erred in recognizing the defense of claim reduction. Section 4 of the Clayton Act provides that a plaintiff "shall recover threefold the damages by him sustained" as a result of an antitrust violation. 15 U.S.C. § 15 (1976). From the earliest days of the Sherman Act, courts have treated antitrust violations as akin to torts, and have therefore applied to treble-damage awards the common-law rule that tortfeasors who act in concert to commit a wrong are jointly and severally liable for the entire amount of the resulting damages *See City of Atlanta* v. *Chattanooga Foundry & Pipeworks*, 127 F. 23, 26 (6 Cir. 1903), *aff'd*, 202 U.S. 390 (1906). Under traditional principles of compensation, however, a coconspirator is entitled to the defense of payment to the extent of any sum received by the plaintiff in settlement with another coconspirator. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 348 (1971). To reconcile this defense with the treble-damage mandate of the Clayton Act, the heretofore unbroken rule has been that any settlement payments are deducted from the damages award *after* trebling. [392]

Flintkote Co. v. *Lysfjord,* 246 F.2d 368, 397-98 (9 Cir.) *cert. denied,* 355 U.S. 835 (1957); *accord, Hydrolevel Corp.* v. *American Society of Mechanical Engineers, Inc.,* 635 F.2d 118, 130 (2 Cir. 1980), *aff'd,* —— U.S. ——, 72 L. Ed. 2d 330 (1982).[8] No court of which we are aware has ever applied the theory of claim reduction in an antitrust treble-damage action.

In espousing the defense of claim reduction, the district court recognized the settlement as a complete bar to defendants' joint and several liability for Leesona's participation in the price-fixing conspiracy. It did so to avoid what it perceived to be the unfairness which would result from applying the conventional rule in the circumstances of this case.

Two recent decisions by the Supreme Court bear on the merits of the district court's ruling. In *Texas Industries, Inc.* v. *Radcliff Materials, Inc.,* 451 U.S. 630 (1981), the

8. This methodology and its rationale were cogently summarized in *Wainright* v. *Kraftco.,* 58 F.R.D. 9 (N.D. Ga. 1973):

> [A]n antitrust plaintiff may choose to sue but one of several co-conspirators, and that one co-conspirator will be responsible for the entire amount of damages caused by all. Of course an antitrust plaintiff may not recover double payment, and if during a case an antitrust plaintiff recovers an item of damage from one co-conspirator through a release he may not recover that same item later from another co-conspirator still in the case. This does not, however, diminish the responsibility of each co-conspirator for the entire amount of damages. Thus if an antitrust plaintiff sues four co-conspirators alleging $100,000 damages, and during the suit three of the co-conspirators are released upon a total payment of $50,000, and the jury returns a verdict assessing damages at $100,000, as a matter of computation the remaining co-conspirator is liable for the entire amount of damages trebled—$300,000—and his defense of payment will result only in a deduction of $50,000 from the trebled amount, leaving him with a liability of $250,000.

Id. at 12 (citations omitted).

Court declined to create an implied cause of action for contribution among antitrust coconspirators. Although the narrow holding of *Texas Industries* does not expressly foreclose a defense of claim reduction, the opinion rests on principles which are inconsistent with such a defense. For example, the Court observed that proponents of contribution "presuppose a legislative intent to allow parties violating the law to draw upon equitable principles to mitigate the consequences of their wrongdoing," *id.* at 635, whereas "[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers," *id.* at 639. The Court emphasized that "[t]here is nothing in the [Clayton Act] itself, in its legislative history, or in the overall regulatory scheme to suggest that Congress intended courts to have the power to alter or supplement the remedies enacted." *Id.* at 645. Finally, the opinion stressed that the contribution question implicates complex policy issues which are more properly decided by legislation than by judicial decision. *Id.* at 646-47.

The same theme runs through the second case, *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, —— U.S. ——, 72 L. Ed. 2d 330 (1982). That case held a nonprofit professional society liable for treble damages for a violation of § 1 of the Sherman Act on a theory of "apparent authority," although the society had in no way profited by the anticompetitive conduct of its apparent but unauthorized agents. The opinion noted that "[i]n the past, the Court has refused to permit broad common law barriers to relief to constrict the antitrust private right of action." *Id.* at 341 (citing *Perma Life Mufflers, Inc.* v. *International*

Parts Corp., 392 U.S. 134 (1968)). Because the apparent authority concept was found to be consistent with the congressional intention to encourage competition, it was held to apply under the antitrust laws. *Id.* at 342. The Court reasoned that holding the principal to antitrust liability [393] would create a strong incentive for the principal to prevent antitrust conduct on the part of its agents. In that connection, the Court stressed "the congressional desire that the antitrust laws sweep broadly." *Id.* at 344 n.11. Finally, the Court pointed out that treble damages were meant to deter future antitrust violations, as well as to punish particular antitrust violators, and to counter-balance the difficulty of maintaining a private suit for an antitrust violation. *Id.* at 345-46.

Equally germane is an aspect of the Second Circuit's opinion in *Hydrolevel* not dealt with by the Supreme Court. 635 F.2d 118 (2 Cir. 1980), *aff'd*, —— U.S. ——, 72 L. Ed. 2d 330 (1982). The trial court had attempted to soften the blow of a treble-damage award by deducting the settlement payments of a coconspirator *before* trebling the damages. The Second Circuit reversed and held that settlement payments must be deducted after trebling to give full effect to the Clayton Act's express remedy. The court reaffirmed the three-pronged rationale of *Flintkote Co.* v. *Lysfjord*, 246 F.2d 368 (9 Cir.), *cert. denied*, 355 U.S. 835 (1957):

> First, the antitrust laws provide that the plaintiff should receive three times the proven actual damages. If settlement proceeds are deducted before trebling, the plaintiff's total award is less than what the law allows. Since antitrust defendants are joint tortfeasors, each is liable to complete the total deserved dam-

> ages irrespective of fault. Second, . . . one purpose of the trebling provision is to encourage private plaintiffs to bring suit. Any ultimate recovery totaling less than three times proven damages would weaken the statutory incentive through judicial construction. Third, deduction of settlement proceeds before trebling would discourage settlement by making litigation relatively more profitable for plaintiffs: every dollar received in settlement would cause a three dollar reduction in the judgment at trial.

Hydrolevel Corp., 635 F.2d at 130.

We think that the broad concerns of the *Texas Industries* and *Hydrolevel Corp.* decisions militate strongly against the judicial creation of an equitable defense of claim reduction in antitrust cases. They caution against implying novel limitations on the broad sweep and heavy deterrent force of the antitrust laws. And they counsel that judicial notions of fairness and equity must yield to the prophylactic policies of the treble-damage remedy.

Defendants note that the doctrine of joint and several liability was imported into antitrusts law by judicial decision, rather than by express statutory command. It follows, they contend, that the statute leaves the judiciary with sufficient scope to prevent unfairness in the application of joint and several liability to treble-damage awards. As examples of the exercise of that power, defendants cite *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971), *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), and *Columbia Nitrogen Corp.* v. *Royster Co.*, 451 F.2d 3 (4 Cir. 1971). In *Zenith*, the Supreme Court recognized in dictim that "a plaintiff who has recovered any item of damage from one [antitrust]cocon-

spirator may not again recover the same item from another conspirator; the law, that is, does not permit a plaintiff to recover double payment." 401 U.S. at 348. In *Perma Life Mufflers,* five Justices held that in pari delicto is no defense to an antitrust action, but commented that benefits conferred upon a plaintiff as a result of complicity in the defendant's antitrust violation "can of course be taken into consideration in computing damages." 392 U.S. at 140. In *Columbia Nitrogen,* we held that, under the concurring and dissenting opinions in *Perma Life Mufflers,* "when parties of substantially equal economic strength mutually participate in the formulation and execution of the scheme and bear [394] equal responsibility for the consequent restraint of trade, each is barred from seeking treble damages from the other." 451 F.2d at 15-16 (footnote omitted). *See* note 6 *supra.*

Defendants' arguments are not persuasive. In engrafting the doctrine of joint and several liability onto the express remedies of the antitrust laws, courts have construed the statutes against the background of the common law and traditional jurisprudence. Defendants have failed to show that an equitable defense of claim reduction was known to the law when Congress enacted the treble-damage remedy. Moreover, the power to interpret the antitrust statutes under traditional legal principles not inconsistent with statutory policies by no means implies that courts are free to soften their construction of the treble-damage remedy on a case-by-case basis. Nor do the cases cited by defendants stand for any such power. *Columbia Nitrogen* did not qualify the treble-damage remedy, but rather withheld the remedy altogether under the ancient notion that the courts will

not aid a wrongdoer against misconduct in which he took part. The dictum of *Perma Life Mufflers* merely recognized that beneficial by-products of a legal wrong must be taken into account in measuring a plaintiff's injury. And *Zenith* simply acknowledged the compensation principle, basic to the law of remedies, under which a plaintiff is entitled to redress his injury once in full but not a second time. All of these cases, then, were decided under long-established principles of general applicability, and not under fact-specific considerations of fairness. They provide no support for the argument that courts have discretion to vary their interpretation of the treble-damage remedy to avoid harsh results in particular cases.[9]

In short, we reject defendants' contention that claim reduction rests within the discretion of the judiciary and does no violence to statutory policies. In the form employed by the district court, claim reduction would convert joint and several liability for treble-damage awards from a legal rule of general applicability to a case-by-case determination of fairness. Such broad discretion clashes with the unqualified language of the Clayton Act entitling anti-

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9. Indeed, defendants' claim reduction theory clashes directly with the *Zenith* decision. The *Zenith* Court held that when an antitrust conspirator settles with a plaintiff and obtains a release, the release does not insulate co-conspirators from liability unless the parties to the settlement so intend. 401 U.S. at 347. This rule was adopted to promote partial settlements of antitrust cases involving multiple parties. *See id.* It is undisputed here that, in entering into the Leesona settlement, plaintiffs expressly reserved their right to proceed against defendants. Yet the district court disregarded plaintiffs' intent and ruled, in effect, that the settlement relieved defendants of joint and several liability. To allow the district court's decision to stand would scuttle the policy articulated in *Zenith* by giving antitrust plaintiffs a powerful incentive to avoid partial settlements.

trust plaintiffs to recover their damages threefold. Moreover, whether applied selectively or uniformly, claim reduction would amount to a fundamental departure from joint and several liability, which has been the established doctrine of antitrust law for the better part of a century and which Congress has not seen fit to disapprove.

We reject also defendants' argument that claim reduction is necessary to prevent a particularly culpable antitrust violator from using settlement as an anticompetitive device for shifting liability to its erstwhile coconspirators. The Supreme Court heard similar arguments in *Texas Industries,* and its response is fully applicable here:

> The range of factors to be weighed in deciding whether a right to contribution should exist demonstrates the inappropriateness of judicial resolution of this complex issue. Ascertaining what is "fair" in this setting calls for inquiry into the entire spectrum of antitrust law, not simply the elements of a particular case or category of cases. Similarly, whether contribution would strengthen or weaken enforcement of the antitrust laws, or what form a right to contribution should take, cannot be resolved without going beyond the record of a single lawsuit. As in *Diamond* v. *Chakrabarty,* 447 U.S. 303, 317, 65 L. Ed. 2d 144, 100 S. Ct. 2204 (1980) [395]:
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> > "The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the con-

> tentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts."

Accord, *United States* v. *Topco Associates,* 405 U.S. 596, 611-612, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972).

Texas Industries, 451 U.S. at 646-47.

Like contribution, claim reduction raises the question whether the antitrust laws, as heretofore applied, provide excessive deterrence. The essentially legislative character of that question is heightened by the fact that Congress is presently considering a bill to establish claim reduction and contribution for antitrust defendants. S. 995, 97th Cong., 1st Sess. (1982). We decline to speculate on the fate of this bill, but we readily acknowledge that Congress, not the courts, is the forum where the decision whether or not to recognize the defense should be made.

We conclude that the district court erred in recognizing the defense of claim reduction. On remand, defendants should be held jointly and severally liable for all damages arising from their conspiracy with Leesona.

VACATED AND REMANDED.

HALL, Circuit Judge, concurring in part and dissenting in part:

It is axiomatic that a party may not profit from its own wrongdoing. Yet the majority allows Burlington to receive a windfall at the expense of the defendants even though, at the time the defendants and Leesona struck their agreement, Burlington and Leesona were already parties to a remarkably similar royalty scheme, and the conspir-

acy in this case merely preserved that arrangement. Burlington benefitted handsomely from its deal with Leesona, receiving secret kickbacks from its royalty payments, and thereby securing a competitive advantage over its smaller rivals. Now, however, Burlington would have us hold that it was actually damaged by Leesona's royalty program. I am astonished that my brethren would countenance Burlington's opportunistic approach to this case much less sanction a reward for such reprehensible conduct. Accordingly, although I concur in much of the majority's opinion, I respectfully dissent to Part III.

Leesona and the defendants in this case started out in the late 1950's as competitors trying to market patented false twisting machinery. They were also originally combatants in litigation which brought the validity of Leesona's patents into question, (the *Whitin* litigation). However, shortly before trial, in 1964, the parties to that litigation realized that they were jeopardizing all of their royalty programs; even if the Leesona patents were held invalid, the defendants still would have been unable to demand royalties for the use of their false twisting machinery in the face of unlicensed competition for Leesona.[1] Consequently, they renounced their adversarial positions and settled the *Whitin* litigation in order to "preserve and enhance the interdependent royalty programs which a trial . . . might well have destroyed." *Duplan Corp.* v. *Deering Milliken*, 444 F.Supp. 648 (D. S.C. 1977). In the

1. Robert Lessona, president of Leesona, convinced Norman Armitage, an officer of DMRC, that the *Whitin* litigation should be settled, saying, "[T]here is more at stake than the cost of a suit. If you win, you lose, and if you lose, you lose—because if the patent is broken, there will be no royalty." 444 F.Supp. at 680.

liability portion of this case, that settlement, with the attendant restraint of trade, was held to be an horizontal antitrust conspiracy between Leesona [396] and the defendants, a *per se* violation of § 1 and § 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. *Id., aff'd,* 594 F.2d 979 (4th Cir. 1979).

Burlington and its subsidiaries, as plaintiffs injured by the conspiracy, claim as damages all of the royalties paid to the defendants and to Leesona after they conspired to block the *Whitin* litigation. Their damages theory is that the *Whitin* litigation, had it gone to trial, could have invalidated Leesona's patents and eliminated the royalty programs. However, only a year before the *Whitin* settlement, Burlington itself abandoned an opportunity to test the same patents which would be at issue in the *Whitin* case, finding its own interests better served by paying royalties to Leesona in exchange for secret rebates. Thus, Burlington's claim for royalties paid to Leesona rings hollow.

Burlington's relationship with Leesona evolved as follows: In the late 1950's, Burlington subsidiaries were using unlicensed high speed spindles manufactured by Mechanical Specialty Company. By avoiding royalties which would otherwise have been payable to Leesona, the Burlington companies enjoyed a competitive edge over smaller throwsters. In an attempt to curb this unlicensed competition, Leesona sued for patent infringement and nonpayment of royalties in consolidated cases against Madison (a Burlington subsidiary), and Mechanical Specialty (the *Mechanical Specialty* litigation).

The defendants in the *Mechanical Specialty* case were confident that they could win on the merits, convinced that the Leesona patents were invalid. Burlington was caught in a bind. If the Leesona patents were invalidated, the other throwsters would be relieved of their royalty obligations, which would eliminate Burlington's cost advantage; on the other hand, if the Leesona patents were valid, Burlington would have to pay the same royalties as everyone else.[2]

Burlington solved its dilemma by, in the words of the district court, "orchestrating" a settlement to its own great advantage. In 1963, the defendants entered final consent judgments admitting validity and infringement. Burlington and Madison paid some damages for unlicensed prior use and took Leesona licenses, agreeing to pay royalties in the future. In return, Burlington and Madison received back one third of the royalties they paid to Leesona, thereby protecting a portion of their competitive margin over Leesona's other licensees. This part of the settlement had to be kept secret because Leesona licenses contained "most-favored nations" clauses which required that all Leesona licensees be offered the same terms.

A year later, in the *Whitin* settlement, Leesona and the defendants in this case mutually affirmed their respective royalty system. The kickback scheme thus firmly in place, Burlington and Madison continued to prosper from their intrigue.

In the late 1960's, the other throwsters stopped paying royalties to Leesona. Consequently, Burlington's competitive edge evaporated, and it no longer benefitted from

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2. Thus, Burlington was faced with the same sort of choice which would precipitate the *Whitin* settlement. See footnote 1 and accompanying text.

supporting Leesona's royalty program. So, at that time, Burlington joined the other throwsters in challenging the Leesona royalty system as a horizonal conspiracy in the cases consolidated in the fifth circuit as *In Re Yarn Processing Patent Validity Litigation,* MDL-82. Burlington never revealed in that litigation that it had been instrumental in preserving Leesona's royalty program, nor that it had been the beneficiary of the one-third rebates which it was so stridently denouncing as illegal.[3]

Burlington and Leesona settled their differences in the *In Re Yarn Processing* case. Burlington recovered only a fraction of the damages claimed in that case, but would have the defendants in this case make up [397] and treble the difference.[4] The district court ultimately refused to sanction Burlington's attempts to hold these defendants accountable for the royalties paid to Leesona. The amended judgment subtracted all of the Leesona-based damages on the theory that Burlington had bargained its claim to damages from Leesona's royalty program when it settled the *In Re Yarn Processing* case for such a small sum.

I agree in principle with the district court that, on this basis alone, we should have an appropriate case for claim reduction. However, the majority's conclusion in Part VIII of the opinion is unassailable: the defense of claim reduction is not available in antitrust cases.

Yet that answer is not dispositive of this case. A more fundamental principle of our jurisprudence is that

3. Leesona raised an estoppel defense, but the case was settled before that issue could be fully aired.

4. Burlington asserted claims in the MDL-82 litigation aggregating $26,000,000, but released Leesona for $789,683. In this case, Burlington claims damages based on the royalty payments to Leesona (after subtracting the amount received from settling the *In Re Yarn Processing* case), amounting to $13,439,793.72.

a party may not profit from its own inequity or take advantage of its own wrong. Cardozo, *The Nature of the Judicial Process* at 41.

The majority sloughs off the defendants' attempt to show that Burlington caused a large portion of its claimed damages by saying that this issue is one of liability rather than damages, and thus cannot be considered at this time. Maj. Op. at 17. In my view, this claim, which potentially involves two-thirds of the damages, deserves more than the majority's pat dismissal.

Moreover, the majority has missed the point. This is not a situation of in pari delicto. The conspiracy between Leesona and Burlington is not the same as the conspiracy between Leesona and the defendants here. Burlington had no direct part in the conspiracy in this case. Thus, it was not necessary to go into the background of the relationship between Leesona and Burlington in order to determine liability for the conspiracy between Leesona and the defendants.

Now we are considering the very different question of whether to award damages to the extent of all royalties paid to Leesona and the defendants after the *Whitin* settlement. Regardless of the defendants' potential liability, I would not permit Burlington to recover any of the royalties paid to Leesona. Burlington engineered the *Mechanical Specialty* litigation settlement with Leesona, and designed the royalty-kickback machinery for their mutual benefit. The *Whitin* settlement between the defendants and Leesona simply perpetuated that compact. Burlington now should not be heard to complain that it was actually harmed by its own scheme—a scheme different from the one the majority finds to have been disposed of in the liability portion of this litigation.

Original Opinion of the District Court on Damages

[Officially unreported]

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

SPARTANBURG DIVISION

Consolidated Civil Action
No. 71-306

THE DUPLAN CORPORATION, *et al.*,
Plaintiffs

vs.

DEERING MILLIKEN, INC., DEERING MILLIKEN RESEARCH CORPORATION, MOULINAGE ET RETORDERIE DE CHAVANOZ, ATELIERS ROANNAIS DE CONSTRUCTIONS TEXTILES, and ARCT, INC.,
Defendants

MEMORANDUM OF DECISION

This patent-antitrust litigation consisting of thirty-seven separate actions consolidated for purposes of trial was tried to the court without a jury on the liability issues only over ninety-one trial days between June 14, 1976 and February 11, 1977. The damages issues were reserved for trial later. In a memorandum of decision reported at 444 F.Supp. 648 (D.S.C. 1977), this court found the defendants, Deering Milliken, Inc. (DMI), Deering Milliken Research Corporation (DMRC) and Moulinage et Retorderie de Chavanoz (Chavanoz) had entered into a horizontal

antitrust conspiracy with Leesona Corporation (Leesona) on March 31, 1964 in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, the objects of which conspiracy were to fix and maintain prices in the form of royalties on yarn produced on machines embodying inventions patented in the names of Leesona and Chavanoz and to monopolize the market in the sale and licensing of false twist texturing machinery, processes and technology. At the same time this court held that plaintiffs had failed to establish by a preponderance of the evidence that defendants, Ateliers Roannais de Constructions Textiles (ARCT-France) and ARCT, Inc., should be bound by the conspiracy (see 444 F.Supp. 689-691). This court's ruling as to the horizontal conspiracy was upheld by the Court of Appeals for the Fourth Circuit, 594 F.2d 979 (1979), but the ruling relieving the ARCT defendants from liability was reversed with the result that these defendants were restored to the case and made liable for the damages to be assessed.

The Supreme Court denied certiorari, —— U.S ——, 100 S.Ct. 666 (1980), and the case was returned to this court for trial on the damages issues. Following several months of additional discovery on these issues by agreement of the parties the case came on for trial at Raleigh, North Carolina, on November 17, 1980 and the trial continued through December 4, 1980. Between the commencement of the liability trial in 1976 and the damages trial in 1980 several of the original thirty-seven cases were disposed of by settlements, and at the time of the damages trial only sixteen of the original plaintiffs remained in the

case. Since the damages trial fourteen of these plaintiffs have settled their cases with the defendants, and the court having been recently informed that settlement negotiations between the two remaining plaintiffs, Burlington Industries, Inc. (Burlington) and Madison Throwing Company (Madison) and the defendants have reached an impasse, it now becomes necessary that the court decide the damages issues between these two plaintiffs and the defendants.[1] In this memorandum of decision the court will record its findings of fact and conclusions of law in compliance with Rule 52(a), F.R.Civ.P.

Following the return of the case to this court the parties conducted discovery directed to the damages issues, and several motions were filed for the purpose of having the court define the issues to be litigated at the damages trial. In response to these motions the court in an order dated August 4, 1980 ruled as follows:

> "This court has held, 444 F.Supp. 648 at page 687, that proof of the payment of royalties by the plaintiffs following the illegal combination found to have existed between DMRC and Leesona sufficed to establish the fact of damage, and the court is now of opinion that proof of the amount of such royalties by plaintiffs will suffice to establish a prima facie case of actual damages subject to diminution by the value of any considerations received by the plaintiffs in return for

1. Prior to October 3, 1970, Madison had been a wholly-owned subsidiary of Burlington, and on that date Madison was merged into Burlington which is in reality the sole remaining plaintiff in the case. Throughout the litigation, however, the parties have continued to treat Burlington and Madison as separate entities and have submitted separate proposed findings of fact for each. For the sake of convenience the court will also continue to treat them as separate entities.

> the royalties such as 'support services' allegedly furnished plaintiffs by DMRC during the damages period. With this exception the court is of opinion that the various questions mentioned above which defendants propose to litigate at the damages trial are not properly before the court and consequently are not proper subjects for discovery prior to the trial."

The broad issues to be determined at this time, therefore, are the damages periods, the amount of damages and offsets against the damage claims.

I. The Damages Periods.

Section 4B of the Clayton Act, 15 U.S.C. § 15b, provides in substance that actions to enforce antitrust violations shall be forever barred unless commenced within four years after the accrual of the cause of action. In rejecting the defendants' plea of the statute of limitations at the liability trial this court ruled that the plaintiffs would be entitled to recover "all damages which plaintiffs may show have been sustained within four years preceding their suits resulting solely from acts of the defendants committed during the four-year period." It thus becomes necessary to determine the dates on which Burlington and Madison filed pleadings against the several defendants charging them with the horizontal antitrust conspiracy which the court found to exist.

The first suit in which Burlington filed such pleading was the action instituted against it by DMRC on December 19, 1969, in the District of South Carolina which became Civil Action No. 69-1096. The complaint in that action alleged the breach of a patent license agreement by Bur-

lington in failing to pay royalties due DMRC and it also sought a declaratory judgment that plaintiff's license agreements were valid and enforceable. Burlington filed an answer and a counterclaim in that action on February 16, 1970 denying generally the allegations of the complaint and asserting several affirmative defenses against the patents on which the license agreements in suit were based. In its counterclaim Burlington alleged violations by DMRC of Sections 1 and 2 of the Sherman Act and it sought a decree declaring the licenses and patents unenforceable and an award of treble damages. Defendants do not contest the fact that the allegations of the counterclaim sufficed to state a cause of action for a vertical conspiracy involving DMRC, Chavanoz and the ARCT defendants, and the question for decision, therefore, is whether the allegations were sufficient to put DMRC as defendant on the counterclaim on notice that a horizontal conspiracy would also be sought to be established. This requires consideration of the effect of paragraph 24 of the counterclaim which reads as follows:

> "24. Upon information and belief, the plaintiff has planned, conspired, combined and contracted and agreed with others, both in this country and in foreign countries, to restrain trade in both inter-state and foreign commerce to unlawfully monopolize and create a monopoly in the textile texturing trade, and in the equipment and machinery utilized therein, by entering into agreements and understandings in furtherance of the acts and practices alleged in paragraph 23 hereof. Defendant is presently unaware of the exact identity of all of those who have co-conspired with plaintiff, and of the full extent of their participation in unlawful

> acts and practices of plaintiff, and begs leave of the court to ascertain the same by discovery procedures under the Federal Rules of Civil Procedure."

The defendants contend that these allegations at best are but a repetition of the allegations of the vertical conspiracy alleged in the preceding paragraph and that since there is no mention whatever of Leesona at any place in the answer or counterclaim, the bald allegation that "the plaintiff has planned, conspired, combined and contracted and agreed with others, both in this country and in foreign countries, to restrain trade. . ." was a mere conclusion which did not state a cause of action for any kind of antitrust violation, horizontal or vertical.

The court is unable to agree. To begin with there was no reason for DMRC to assume that the "others" referred to included Chavanoz and the ARCT defendants, for they had already been named in the pleadings and the allegation states that other co-conspirators were not known to the counterclaimant and that discovery would be necessary to identify them. Faced with these admittedly vague allegations two choices were available to DMRC: it could have moved for a more definite statement or it could have sought more specifically through the use of discovery procedures. It chose the latter.

On September 24, 1970, DMRC served a set of interrogatories which, among other things, inquired into the contentions of the plaintiffs and the factual bases underlying the allegations of patent misue and antitrust violations which had been asserted against it. In its answer to DMRC's interrogatories filed October 30, 1970, Burlington said:

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"51. [Burlington] contends that [DMRC] entered into an agreement, or series of agreements with Chavanoz, ARCT, Whitin Machine Works, The Leesona Corporation, and possibly others, in furtherance of an agreement or conspiracy to restrain trade in interstate and foreign commerce by unlawfully monopolizing and attempting to monopolize the market for textile texturing machinery by means of a division of competing patent rights. The place of acts in furtherance of these agreements is not presently known to defendants but the time is believed to have been sometime in March, 1964. Participants are believed to have been, for Chavanoz and ARCT, one Leonard Soep; for Leesona Corporation, one Harold Rogers; and for plaintiff, one Norman Armitage."

In its answer to the next interrogatory Burlington identified the agreement itself which the court has now held to have created the horizontal conspiracy when it said:

"52. * * * * (C) Agreements dated March 31, 1964 between the Leesona Corporation and ARCT, Whitin Machine Works, Chavanoz, and [DMRC], copies of which [DMRC] is presumed to have."

It thus appears that DMRC was fully informed at a very early stage in the litigation that Burlington would be undertaking to establish the horizontal conspiracy with Leesona as well as the vertical conspiracy with the other defendants with whom DMRC was in direct privity, and the court is of opinion that paragraph 24 of Burlington's counterclaim sufficed to state a cause of action for the horizontal conspiracy. If further evidence in support of this conclusion is necessary, it suffices to say that after receiving Bur-

lington's answers to its interrogatories DMRC never thereafter questioned the sufficiency of Burlington's pleadings, and the question of the horizontal conspiracy was fully litigated at the trial on the liability issues without protest by any party defendant. The statute of limitations defense which was vigorously pressed at that trial and in the briefing which followed it referred only to the fact that more than four years had elapsed between the date of the 1964 agreement with Leesona and the date in November, 1969 when the first of the antitrust suits was instituted against DMRC.

Having decided that the filing of Burlington's counterclaim tolled the statute of limitations as to the horizontal antitrust conspiracy, the next question is whether the counerclaim was compulsory within the purview of Rule 13(a), F.R.Civ.P., so as to allow the tolling to relate back to the date of the institution of DMRC's suit on December 19, 1969. Under that rule a counterclaim is compulsory "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." The court is of opinion that the counterclaim did arise out of the "same transaction or occurrence" which formed the basis of DMRC's complaints, that is, the existence and enforceability of the license agreements and their subject matter patents. Although there is a split of authority as to whether the filing of a complaint tolls the statute of limitations governing a compulsory counterclaim based on federal law, where, as here, there is a close relation between

the claims of the plaintiff and the counterclaim of the defendant, the court is of opinion that application of the relation back rule is warranted in this instance and will so hold. *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 473 F.Supp. 1296 (D.Hawaii 1979). It follows that Burlington is entitled to recover damages as against DMRC for the four-year period immediately prior to December 19, 1969.

Following the trial on the liability issues this court ruled that in entering into the horizontal conspiracy with Leesona and others DMRC acted as the agent, instrumentality and alter ego of DMI. Although DMI was first brought into the litigation by an amendment to Burlington's counterclaim filed April 1, 1971, in which DMI, Chavanoz and the ARCT defendants were added as parties, DMI was not held liable for any separate, individual participation of its own in the conspiracy with Leesona. *See* 444 F.Supp. 648, 689, n. 21. DMI's liability, therefore, is co-extensive with that of DMRC and is not to be determined by reference to a separate four-year damages period, but rather by reference to the same four-year damages period applicable to DMRC. Thus DMI's liability to Burlington will encompass the four-year period prior to December 19, 1969.

Chavanoz and the two ARCT defendants were first brought into the litigation by a separate action filed by Burlington on May 20, 1970, in the United States District Court for the Middle District of North Carolina. DMRC was also named as a party to this suit which was thereafter transferred to the District of South Carolina where

it became Civil Action No. 71-94. Paragraph 20 of the complaint in the action alleged a cause of action for antitrust violations in the following language:

> "20. Upon information and belief, the defendants have planned, conspired, combined and contracted and agreed with each other and with others, both in this country and in foreign countries, to restrain trade in both interstate and foreign commerce in violation of the Sherman Act, 15 U.S.C. §§ 1 and 2, and to unlawfully monopolize and create a monopoly in the textile texturing trade, in the manufacture, use and sale of equipment and machinery utilized therein, by entering into agreements and understandings in furtherance of the acts and practices alleged in paragraph 19 hereof. Plaintiff is presently unaware of the exact identity of all of those who have co-conspired with defendants, and of the full extent of their participation in the unlawful acts and practices of the defendants, and begs leave of the court to ascertain the same by discovery procedures under the Federal Rules of Civil Procedure."

It will be seen that these allegations of Burlington's complaint substantially tracked the allegations of its counterclaim in the original DMRC action, and as before noted, the parties to the horizontal conspiracy and the actual date of the written agreement in which it was embodied were identified in Burlington's answers to interrogatories filed October 30, 1970. For the reasons previously stated the court holds that the filing of Burlington's complaint on May 20, 1970 sufficiently alleged the horizontal conspiracy to toll the running of the statute of limitations against

Chavanoz and the ARCT defendants, and the damages periods as to these three defendants will date back four years from May 20, 1970.

Madison was first sued by DMRC in Civil Action No. 70-14 filed in the District of South Carolina on January 29, 1970. The action sought recovery of unpaid royalties and a declaratory judgment as to the validity and enforceability of the license agreements. Madison filed its answer and counterclaim for antitrust violations on February 24, 1970. In paragraphs 21 and 22 of the counterclaim Madison alleged the vertical and horizontal conspiracies in language substantially identical to that employed by Burlington in its counterclaim in Civil Action No. 69-1096. Thereafter Madison in answer to interrogatories identified the participants in the horizontal conspiracy and the date of the agreement in which it was embodied disclosing the same information which Burlington had disclosed in its answers to DMRC's interrogatories.

For the reasons previously stated in connection with establishing the damages periods in the case of Burlington the court holds that the damages periods in Madison's case as against DMRC and DMI shall date back four years from January 29, 1970, the date on which the suit against Madison was instituted.

On the same date that Burlington instituted its action against DMRC, Chavanoz and the two ARCT defendants, May 20, 1970, Madison instituted its action against the same defendants in the Middle District of North Carolina alleging vertical and horizontal antitrust conspiracy violations in substantially the same language as Burlington had

had employed in its suit. Madison's suit was thereafter transferred to the District of South Carolina where it became Civil Action No. 71-95.

For the reasons stated in connection with the discussion of Burlington's suit against Chavanoz and the two ARCT defendants, the court holds that the damages periods as to these defendants shall date back four years from May 20, 1970.

II. Amount of Damages.

A. Claims of Named Party Plaintiffs

As previously noted, the court in its order of August 4, 1980 held that proof of the amount of royalties paid by the plaintiffs to the antitrust conspirators would suffice to establish a prima facie case of actual damages subject to diminution by the value of any considerations received by the plaintiffs in return for the royalties. Plaintiffs and defendants have by stipulation dated November 12, 1980 and introduced in evidence as plaintiff's Exhibit No. 1314-O agreed on the amounts of the royalties paid by Burlington and Madison to DMRC and Leesona on and after December 26, 1965. The figures set forth below have been taken from this exhibit for the damages periods hereinabove established. The amounts shown as royalties paid Leesona are the net amounts paid after deducting refunds paid Burlington and Madison by Leesona during their respective damages periods based on the operation by Burlington and Madison of certain Leesona machines equipped with

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"Joe Smith" spindle on which Burlington held a patent.[2]

In the damages period December 19, 1965-December 19, 1969 Burlington paid royalties to DMRC in the amount of $1,854,595.20 and net royalties to Leesona of $1,604,569.11, total $3,459,164.31. Burlington is entitled to recover treble this amount less certain offsets, some before and some after trebling, as shown in a later section of this memorandum.

In the damages period May 20, 1966-May 20, 1970 Burlington paid royalties to DMRC in the amount of $1,756,981.76 and net royalties to Leesona of $1,394,986.61 or a total of $3,151,968.37. Burlington is entitled to recover treble this amount from Chavanoz, ARCT-France and ARCT, Inc., less certain offsets, some before and some after trebling, as shown in a later section of this memorandum.

In the damages period January 29, 1966-January 29, 1970 Madison paid royalties to DMRC in the amount of $909,186.90 and net royalties to Leesona of $3,388,214.23, total $4,297,401.13. Madison is entitled to recover treble this amount from DMRC and DMI less certain offsets, some before and some after trebling, as shown in a later section of this memorandum.

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2. The amounts of the "Joe Smith" refunds which have been deducted are as follows: $194,815.54 from the royalties paid by Burlington to Leesona during the DMRC/DMI damages period; $164,944.10 from the royalties paid by Burlington to Leesona during the Chavanoz/ARCT-France/ARCT, Inc. damages period; $261,845.56 from the royalties paid by Madison to Leesona during the DMRC-DMI damages period; and $246,794.30 from the royalties paid by Madison to Leesona during the Chavanoz/ARCT-France/ARCT, Inc. damages period.

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In the damages period May 20, 1966-May 20, 1970 Madison paid royalties to DMRC in the amount of $872,946.97 and net royalties to Leesona of $3,230,659.80, total $4,103,-606.77. Madison is entitled to recover treble this amount from Chavanoz, ARCT-France and ARCT, Inc., less certain offsets, some before and some after trebling, as shown in a later section of this memorandum.

B. Claims of Parties Not Named.

Burlington and Madison also seek recovery of substantial damages representing royalties paid by two of their wholly-owned subsidiaries, Atwater Throwing Company (Atwater) and Fedelon Throwing Corporation (Fedelon), to Leesona during the damages periods. Neither of these two corporations was named as a party plaintiff or defendant in this litigation, and not until discovery was being conducted in preparation for the damages trial did it become know that the royalties paid by these two companies were being claimed as damages by Burlington and Madison. The facts relating to the acquisition by Burlington and Madison of these two companies and the bases of their claims differ somewhat and will therefore be treated separately below.

Atwater. Atwater was incorporated under the laws of Pennsylvania on September 26, 1962. On September 29, 1962 Burlington acquired all of Atwater's outstanding stock and Atwater thereupon became a wholly-owned subsidiary of Burlington and remained such until its liquidation in 1977.

In the damages period December 19, 1965-December 19, 1969 Atwater as a patent licensee of Leesona paid Leesona

royalties in the total amount of $148,348.49. In the damages period May 20, 1966-May 20, 1970 royalties paid Leesona by Atwater amounted to $127,471.01. During these periods Burlington maintained a centralized, computerized accounting and bookkeeping system for itself and several of its subsidiaries including Atwater. Under that system Atwater's royalties to Leesona (and most of Atwater's other operating expenses) were paid on Burlington checks by Burlington's accounting department which charged the payments to the separate Atwater books of account which it maintained. The computerized system which effected these transactions automatically charged these payments directly to Atwater's royalty expense account and such payments were never recorded as a charge on the books of Burlington.

That Atwater was regarded by Burlington as maintaining its separate corporate existence is evidenced by the fact that Atwater joined with Burlington as a plaintiff in a complaint against Leesona filed in the Eastern District of New York on October 29, 1969 which action was later transferred to the Southern District of Florida where it became known as Multidistrict Litigation Docket No. 82 (MDL-82). Among the antitrust claims asserted by the plaintiffs in that action was a claim involving the same horizontal conspiracy between Leesona and DMRC to stabilize and maintain royalties on false twist texturing equipment, it being the same claim that the plaintiffs have successfully asserted in this action. As will appear in a later section of this memorandum, MDL-82 was settled, but there can be no doubt that had the plaintiffs prosecuted

the case to successful conclusion Atwater would have been entitled to recover in its own name the very same royalties which Burlington now seeks to recover for itself in this action. In the court's view it is not entitled to do so.

Just as it would have been no defense to Leesona as against Atwater's claim in MDL-82 that Burlington had written the checks in payment of the Atwater royalties, Burlington cannot base a cause of action for the recovery in its own name of these same royalties in this action. The defendants here were entitled to be notified by a pleading setting forth the Atwater claim against which defendants were entitled to assert any defenses they had against Atwater. So long as Atwater continued to operate as a separate corporate entity it and it alone had the right to sue on this claim. It did not do so, and the claim is now barred by the statute of limitations.[3]

Fedelon. Fedelon Throwing Corporation was incorporated under the laws of North Carolina on December 16, 1963. On July 27, 1965 Madison acquired all of Fedelon's outstanding stock whereupon Fedelon became a wholly-owned subsidiary of Madison. Fedelon retained its own corporate existence until October 3, 1970 on which date it was merged into Madison. Fedelon is not separately named as a party plaintiff or defendant in this litigation, and there is no mention of Fedelon or any claim based on royalties paid Leesona by Fedelon in the pleadings.

Unlike Atwater the royalty payments to Leesona by Fedelon were made by Fedelon's own checks. In the dam-

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3. In connection with the Atwarter claim the court adopts as its own defendants' proposed findings of fact AF 1023—AF 1032 inclusive and AF 1034—AF 1039 inclusive.

ages period December 19, 1965-December 19, 1969 these payments totaled $742,311.82. In the damages period May 20, 1966-May 20, 1970 the payments totaled $713,267.69. Madison, however, does not now claim damages back of the four-year period which ended October 3, 1970, the date of Fedelon's merger into Madison. This figure is $688,050.97. Implicit in this is the recognition of the fact that Fedelon as a separate corporate entity and alone had the right to sue in its own name for the recovery of these royalties prior to the merger.

Further evidence of the independent corporate status of Fedelon is found in the fact that in an action similar to the one instituted by Atwater and Burlington against Leesona described above Fedelon and Madison joined as parties plaintiff in a complaint filed in the Eastern District of New York against Leesona on April 21, 1970. This action also was later consolidated with other similar actions as MDL-82.

Madison has correctly framed the issue arising on these facts as follows:

> "Therefore, the only legitimate issue as to the Fedelon royalties is whether after October 3, 1970, Madison was required as a matter of law to serve a *new* pleading in which it repeated the same antitrust claim and (even though Fedelon was *not required* to be named on the pleading) specifically pointed out that a portion (less than 20%) of its claim had originated with 'Fedelon.'" Plaintiffs' Brief of 1-16-81 at pp. 16-17.

The court is of opinion that Madison was required to serve such a pleading in order to toll the running of the

statute of limitations. Plaintiffs in their brief say that they know of no authority supporting such conclusion, and the court is unable to cite any cases directly on point. Nevertheless, due process would seem to preclude the possibility that a litigant might acquire a claim of a similar nature to one already in suit and spring it on his adversary for the first time after liability has been established in a bifurcated trial—the exact situation we have here. If it be assumed that there were valid defenses to Fedelon's claim against Leesona, the right of defendants to assert such defenses would be forever foreclosed if the plaintiffs' theory is correct.[4]

Plaintiffs counter with the argument that defendants can claim no surprise or prejudice by the merger of Fedelon's claim with Madison's on October 3, 1970 for that Madison never at any time through the liability trial expressed any interest in the size or components of Madison's claim. The argument overlooks the fact that defendants already knew the amount of royalties paid DMRC by Madison, and while defendants could not be sure that their defense of claim reduction would be sustained by the court, they did know that these plaintiffs had settled their antitrust action with Leesona in November of 1974, and there was no need, certainly during the liability phase of the suit, to explore the matter of royalties paid Leesona by anyone. Moreover, defendants' conduct was consistent with the position of non-liability which they staunchly maintained throughout the trial of this very close case on the liability issues.

4. Defendants assert that their efforts through discovery to ascertain the value of "support services" rendered by Leesona to Atwater and Fedelon remain unanswered.

It is true, as plaintiffs also argue, that the corporation law of North Carolina effects a transfer of all assets, choses in action, etc., upon the merger of one corporation with another "without further act or deed," but this is not to say that the acquisition of a separate and distinct cause of action by merger relates back to the commencement by the original corporation of an action based on a set of operative facts which had caused similar but unasserted damages to the merging corporation. Under the law no further assignment of Fedelon's cause of action was necessary, but this did not relieve Madison of the duty of asserting the entire Fedelon cause of action against the defendants—not just the damages portion after Madison had established defendants' liability in its own suit.

A further argument of plaintiffs based on the fact that Madison filed an amendment to its answer and counterclaim on April 1, 1971 which was after the merger must fail for the reason that these amended pleadings again gave no hint that damage claims other than those originally alleged were being asserted.

The conclusion is that in the absence of any notice that the Madison claims contained a component representing royalties paid by Madison's subsidiary, Fedelon, to the non-party co-conspirator Leesona Madison is not entitled to recover for such royalties in this action and that the claim for them is now barred by the statute of limitations[5]

5. On the matter of the Fedelon royalties the court adopts as its own defendants' proposed findings of fact Nos. AF 1011-AF 1020 inclusive.

C. Claims for Attorneys' Fees

1. Patent Litigation Fees

Burlington claims as an additional item of damages attorneys' fees and disbursements which it incurred in litigating the patent issues in this litigation and in MDL-82 on behalf of itself and Madison. The amount claimed is $1,281,114.80 trebled or a total of $3,843,344.40.

The facts relating to this claim have been discussed at some length in the court's decision on the liability issues (see 444 F.Supp. 648 at page 701, *et. seq.*) and need not be repeated here. In substance the court failed to find that the patents in issue had been fraudulently procured or that the assertion of the patents in this litigation, with one exception, had been done in bad faith. Plaintiffs have offered no evidence tending to show that the Leesona patents involved in MDL-82 were fraudulently procured or asserted in bad faith.

The parties are apparently in agreement that where an infringement suit is brought as an integral part and in furtherance of a conspiracy to violate the antitrust laws attorneys' fees incurred in defending such infringement suit may be recovered as antitrust damages. *Rex Chainbelt, Inc.* v. *Harco Products, Inc.*, 512 F.2d 993 (9th Cir. 1975). The fact that prosecution of patent litigation may have had the incidental effect of continuing the conspiracy is not conclusive on the issue of whether or not the patent litigation was prosecuted in bad faith and with furtherance of the conspiracy as its main objective.

The court is unable to find by a preponderance of the evidence in this case that the patents in issue in this case

were aggressively asserted as an integral part of the conspiracy by DMRC/Chavanoz or Leesona. Burlington's claim for its patent litigation fees must therefore be denied.[6]

2. Fees Under 35 U.S.C. § 285

As an alternative to its claim for its patent litigation counsel fees Burlington contends that in any event it should recover its attorneys' fees and expenses incurred in defending claims based on the Chavanoz patents in this litigation under 35 U.S.C. § 285 which provides that in patent litigation

> "the court in exceptional cases may award reasonable attorney fees to the prevailing party."

The essential facts involved in the resolution of this claim of Burlington were found by the court in its decision on the liability issues, *see* 444 F.Supp. 648, 695-705, and in the preceding section of this memorandum and these will not be repeated here.

Burlington relies heavily on the fact that the court found the assertion by defendants of U. S. Patent No. 3,232,037 constituted patent misuse and that the court found U. S. Patent No. 2,944,319 not to be enforceable because of the admitted material representations made by the inventor's attorney to the Patent Office. While by no means intending to minimize the wrongful conduct of the defendants with respect to these two patents, the court is unable to find on the basis of all of the facts in the record that this should be

6. On this issue the court adopts as its own defendants' proposed findings of fact Nos. F 5003-F 5015 inclusive.

held to constitute an exceptional case within the purview of Section 285.

In this circuit an exceptional case "occurs only where it would be grossly unjust to make the winning party bear its own attorneys' fees." *Chemithon Corporation* v. *Procter & Gamble Company*, 287 F.Supp. 291, 318 (D.Md. 1968), *aff'd* 427 F.2d 893 (4th Cir. 1970), *cert. denied*, 400 U.S. 925 (1970). *See also DuBuit* v. *Harwell Enterprises, Inc.*, 540 F.2d 690 (4th Cir. 1976).

Notwithstanding the change in the wording of the statute in 1952 to substitute "exceptional cases" for "in its [the court's] discretion," the cases continue to hold that the award of attorney fees under Section 285 is within the court's discretion, and in this circuit it has been held that "the discretion should not be exercised except in situations involving vexatious and unjustified litigation." *American Chain & Cable Company* v. *Rochester Ropes*, 199 F.2d 325, 330 (4th Cir. 1952). On the whole record here the court remains unpersuaded that Burlington whose own counterclaim first brought the validity of the Chavanoz patents into question has made out such a case. The claim for attorneys' fees under Section 285 will be denied.[7]

3. Attorneys' Fees—Antitrust Claims

Having prevailed in the prosecution of their antitrust claim plaintiffs are entitled to recover "the cost of suit, including a reasonable attorney's fee" under Section 4 of

7. In their post-trial brief the Milliken defendants made this pointed inquiry: "It may be asked, at the outset, whether it can ever be 'grossly unjust' for parties that are recovering substantial *trebled* damages to bear their own attorney's fees." Defendants' Post-trial Brief at Page 42.

the Clayton Act, 15 U.S.C. § 15. By agreement of counsel determination of the amounts to be recovered as costs and attorneys' fees is reserved until a later time.

III. Offsets Against Damages Recoverable

A. Claim Reduction

Burlington and Madison were among the plaintiffs who asserted antitrust claims against Leesona in MDL-82. Among the antitrust claims asserted against Leesona in that case was a claim involving the same horizontal conspiracy between Leesona and DMRC to stabilize and maintain royalties on false twist texturing equipment as has been successfully asserted by the plaintiffs in this action. In November, 1974, the plaintiffs in MDL-82 including Burlington and Madison entered into a settlement with Leesona of their antitrust claims under the terms of which Burlington on behalf of itself and Madison received the sum of $789,638.82.[8]

In early 1980 the defendants in this action filed a motion for leave to amend their pleadings to assert the additional affirmative defense of claim reduction seeking to have the court hold that the entire claims of the settling plaintiffs based on royalties paid Leesona should be eliminated from

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8. The settlement agreement contained this provision:

"It is expressly understood and agreed that releasor does not hereby intend to release, and does not release but hereby reserves all rights, claims, causes of action and defenses which releasor had, has now, will have or may acquire against persons other than those released above, including but not by way of limitation, claims, causes of action and defenses which releasor had, has now, will have or may acquire against . . . Whitin Machine Works; Moulinage et Retorderie de Chavanoz; Ateliers Roannais de Constructions Textiles; Deering Milliken Research Corporation; . . . or any other company, its agents or representatives."

this action. The motion to amend was allowed in the court's order of August 4, 1980, previously referred to in which it was stated that

> "the court has carefully considered the very cogent arguments of able counsel for plaintiffs and defendants on the intriguing question as to whether concepts of contribution and claim reduction should now be recognized in antitrust litigation, and while the court is fully cognizant of the uncertainty of the state of the law on these subjects at this time, it has found appealing the logic of the defendants' position here when considered in the light of the peculiar facts of this case and has therefore concluded that defendants' motion of April 1, 1980 to state the additional affirmative defense of claim reduction as annexed to the motion should be and the same is hereby allowed."

Claim reduction is a concomitant of contribution, and it is generally recognized that unless there is a right of contribution among participants in an antitrust violation, the defense of claim reduction is also not available. At the time of the foregoing ruling by this court the right of contribution in such cases had been recognized in only one of the circuits. *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979). The Fifth Circuit had taken a contrary view in *Wilson P. Abraham Construction Corporation* v. *Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979). The latter case was appealed to the Supreme Court, and within the fortnight the Supreme Court has decided that case and has held that there is no basis in federal statutory or common law for allowing federal courts to fashion the right of contribution among anti-

trust wrongdoers. *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, —— U.S. ——, 49 L.W. 4537, decided May 26, 1981.

If the federal courts are not empowered to fashion a federal common law rule of contribution among antitrust wrongdoers, it follows that they are without authority to implement the defense of claim reduction. The result is that the defense of claim reduction must be rejected in this case, and only the $789,638.82 received by Burlington in its settlement with Leesona shall be deductible from the amount of the royalties paid Leesona by Burlington after trebling.[9]

B. Support Services.

Under the court's order of August 4, 1980 plaintiffs' damages are to be measured by the royalties paid to DMRC "'subject to diminution by the value of any considerations received by the plaintiff in return for the royalties such as 'support services' allegedly furnished by DMRC during the damages period." Defendants staunchly maintain that a considerable portion of the royalties collected was in return for technical information, knowhow and other services provided the plaintiffs by DMRC and Leesona. Plaintiffs on the other hand contend that such technical information and services as were provided them were of minimal, if any, value.

9. Since the defense of claim reduction has now been foreclosed by *Texas Industries*, any discussion of the pros and cons of the defense in the antitrust context would be academic. However, the court was very favorably impressed with the eminent fairness of the result it would achieve and was prepared to adopt substantially the proposed findings and conclusions of the defendants on this subject, F 1000-F 1010 and C 1000-C 1017, inclusive, prior to the decision in *Texas Industries*.

Appendix B

While the DMRC royalty agreement obligated DMRC to provide technical services to its licensee, it is ambiguous as to the extent and scope of DMRC's obligation. There is nothing in the agreement to indicate the portion of the royalties attributable to technical services provided and made available thereunder.

The evidence adduced by the parties at trial on this subject was highly conflicting both as to the extent of the support services provided the plaintiffs and the value of the same. On one extreme we had witnesses for the plaintiffs testifying that the services provided were of no value whatever, while on the other extreme the defendants produced an expert witness who testified that the value of the services provided amounted to at least fifty per cent of the royalties paid.

There is no evidence that any plaintiff signed a DMRC license agreement in order to obtain technical services from DMRC or freely agreed, at the time it signed the standard DMRC royalty agreement, to pay any portion of the royalties in order to obtain such services. The evidence in fact is to the contrary—that plaintiffs signed the royalty agreements solely in order to obtain the machines.

The technical services claimed to have been furnished by DMRC fell into five general categories as follows: (1) machine start-up and operator training, (2) development of processing specifications, (3) physical testing of yarns and fabrics, (4) visits by DMRC personnel to the plants of licensees, and (5) visits by licensees personnel to DMRC. With respect to machine start-up and operator training the ARCT defendants, who did not share in the royalty pro-

ceeds, provided a full range of support services, and such services as were furnished by DMRC in this connection were of minimal value. DMRC did provide yarn processing specifications from time to time, but for the most part the licensees depended on the raw yarn producers and their own research and development for such specifications. The same is true of the physical testing of yarns and fabrics. There were some visits by DMRC personnel to the plants of the licensees and some visits by licensee personnel to DMRC, but the evidence affords no basis upon which the value of such visits can be intelligently estimated.

Leesona continuously rendered technical services to its false twist machinery customers during the damages periods, but it had provided similar services during the 1950's when its machines were not subject to a production royalty. Even after the Leesona licensees ceased paying royalties in 1969 it continued to provide technical services to its machinery customers. The services provided by Leesona related primarily to the mechanical features and operation of the Leesona machines. For accounting purposes Leesona's expenses in providing technical services were treated as part of its selling expenses.

Leesona did, however, engage in yarn development work, and although this work was performed as a part of its marketing strategy, the processes which it developed were made available to its licensees without charge, and, of course, was of appreciable value to them. A reasonable allowance for such services against the royalties paid Leesona is therefore in order.

Appendix B

The court is obliged to reject the opinion of defendants' expert that fifty per cent of the royalties paid by plaintiffs to DMRC and Leesona should be attributable to technical services. This witness, although highly qualified in his own field, had no direct and personal knowledge of false twist machinery or processes during the relevant period of 1965-70, and such knowledge as he had was obtained in a short visit to DMRC and to a DMI plant, a review of certain documents furnished by a representative of DMRC and in listening to or reading the trial testimony of several defendants' witnesses. The court adopts as its own plaintiffs' proposed finding of fact No. 22.32 on this subject.

At the same time the court is unable to accept the testimony of some of plaintiffs' witnesses to the effect that the technical services furnished were of no value whatever to the licensees. Plaintiffs elicited evidence tending to show that DMRC's operating expenses amounted to approximately five per cent of the royalties collected, and there was other evidence from which a finding could be made that the maximum amount that can be attributed to DMRC providing technical services is something less than .6% of the list price of raw yarn processed on ARCT machines or 17.14% of the royalties. (*See* Plaintiffs Proposed Finding of Fact No. 22.3.)

On the basis of all evidence offered on this subject the court has concluded that the defendants are entitled to a credit of ten per cent of the royalties paid DMRC and five per cent of the royalties paid Leesona by Burlington and Madison, the same to be deducted from the amounts of the royalties paid before trebling.

C. Other Offsets.

Defendants claim a further offset against the royalties collected by DMRC and Leesona based on an agreement which Leesona entered into with a foreign textile machinery manufacturer, Heberlein, in 1965 pursuant to which Leesona acquired freedom from suit under certain Heberlein patents for itself and for its licensees. The Leesona license agreements, however, do not refer to any Heberlein patent but instead simply provide that production royalties were to be payable as compensation for the license granted under the Leesona patents. There is no evidence that any plaintiff signed a Leesona license in order to obtain immunity from suit by Heberlein or that Leesona ever advised any plaintiff that by signing the Leesona license it was obtaining any such immunity. There is no evidence that Heberlein ever sued any user of false twist machines under its patents or ever threatened to do so.

Assuming that the agreement between Leesona and Heberlein would have constituted a defense to a patent suit brought by Heberlein against a Leesona licensee, the value of such immunity would be so speculative as to make it impossible for the court to assign a value to it with any assurance of correctness. Defendants' claim to an offset on this basis is therefore denied.

In summary, after applying the offsets as found to be allowable in this section of the memorandum the revised amounts for which recovery will be allowed are as follows:

Appendix B

Burlington against DMRC/DMI based on royalties paid:

DMRC	$ 1,854,595.20	
Less 10% for support services	185,459.52	
		$ 1,669,135.68
Leesona	$ 1,604,569.11	
Less 5% for support services	80,228.45	
		1,524,340.66
		$ 3,193,476.34
Trebled		$ 9,580,429.02
Less Leesona settlement		789,638.82
Total		$ 8,790,790.20

Burlington against Chavanoz, ARCT-France and ARCT, Inc., based on royalties paid:

DMRC	$ 1,756,981.76	
Less 10% for support services	175,698.17	
		$ 1,581,283.59
Leesona	1,394.986.61	
Less 5% for support services	69,749.33	
		1,325,237.28
		$ 2,906,520.87
Trebled		$ 8,719,562.61
Less Leesona settlement		789,638.82
Total		$ 7,929,923.79

Appendix B

Madison against DMRC/DMI based on royalties paid:

DMRC	$ 909,186.90	
Less 10% for support services	90,918.69	
		$ 818,268.21
Leesona	3,388,214.23	
Less 5% for support services	169,410.71	
		3,218,803.52
		$ 4,037,071.73
Trebled Total		$12,111,215.19

Madison against Chavanoz, ARCT-France and ARCT, Inc., based on royalties paid:

DMRC	$ 872,946.97	
Less 10% for support services	87,294.69	
		$ 785,652.28
Leesona	$ 3,230,659.80	
Less 5% for support services	161,532.99	
		3,069,126.81
		$ 3,854,779.09
Trebled Total		$11,564,337.27

The total of the damages recoverable by Burlington and Madison against DMRC and DMI ($8,790,790.20 plus $12,111,215.19) is $20,902,005.39. The total of the damages recoverable by Burlington and Madison against Chavanoz, ARCT-France and ARCT, Inc. ($7,929,923.79 plus $11,564,337.27) is $19,494,261.06. Burlington by reason of

Madison's merger into it is entitled to all damages properly recoverable by both Burlington and Madison in this action. As the sole remaining plaintiff in the case judgment will therefore be entered for Burlington in accordance with the foregoing findings and conclusions together with costs and reasonable attorneys' fees to be determined later.

The parties may present an appropriate judgment order in conformity with the findings and conclusions in this memorandum.

/s/ F. T. Dupree, Jr.

F. T. Dupree, Jr.
United States District Judge

June 12, 1981.

Amended Opinion of the District Court on Damages
[Officially unreported]

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

SPARTANBURG DIVISION

Consolidated Civil Action No. 71-306

and

Civil Action Nos. 69-1096; 70-14; 71-94; and 71-95

BURLINGTON INDUSTRIES, INC. and
MADISON THROWING COMPANY, INC.,

Plaintiffs,

vs.

DEERING MILLIKEN, INC., DEERING MILLIKEN RESEARCH CORPORATION, MOULINAGE ET RETORDERIE DE CHAVANOZ, ATELIERS ROANNAIS DE CONSTRUCTIONS TEXTILES, and ARCT, INC.,

Defendants.

MEMORANDUM AND ORDER

This action is now before the court on the motion of defendants filed December 7, 1981 pursuant to Rule 60(b), F.R.Civ.P., for an order reducing the judgment order on damages filed herein on July 8, 1981, by excluding from that judgment order the amounts based on plaintiffs'

royalty payments to Leesona Corporation. Since the case is presently pending on appeal in the Court of Appeals for the Fourth Circuit action on this motion can only be taken in this court in the event that the Court of Appeals honors this court's motion for a limited remand for this purpose. Such motion to which will be attached a copy of this memorandum and order and a proposed order amending the judgment order on damages will be filed in the Fourth Circuit forthwith.

The question for decision involves the legal sufficiency of the defense of claim reduction interposed by defendants in connection with the trial of the damages issue before this court in late 1980. Briefly, the defense was based on the admitted fact that a very substantial portion of the damages sought to be recovered by plaintiffs in this antitrust action related to royalties paid by plaintiffs to Leesona Corporation, previously found to have been a co-conspirator with defendants but not sued in this action. Prior to trial plaintiffs had settled their claim against Leesona for a sum far less than the amount of royalties which they had paid Leesona, and defendants in this action sought to have excluded from plaintiffs' recovery the entire amount of royalties paid Lessona rather than the much lesser figure which plaintiffs had accepted in settlement of their Leesona claim.

On two occasions this court has expressed in orders its inclination to rule with defendants on this question, stating in its order of August 4, 1980 allowing defendants' motion to amend to assert the affirmative defense of claim reduction that

> "the court has carefully considered the very cogent arguments of able counsel for plaintiffs and defendants on the intriguing question as to whether concepts of contribution and claim reduction should now be recognized in antitrust litigation, and while the court is fully cognizant of the uncertainty of the state of the law on these subjects at this time, it has found appealing the logic of the defendants' position here when considered in the light of the peculiar facts of this case and has therefore concluded that defendants' motion of April 1, 1980 to state the additional affirmative defense of claim reduction as annexed to the motion should be and the same is hereby allowed."

and at Footnote 9 in the court's memorandum of decision filed June 15, 1981 that

> "Since the defense of claim reduction has now been foreclosed by *Texas Industries*, any discussion of the pros and cons of the defense in the antitrust context would be academic. However, the court was very favorably impressed with the eminent fairness of the result it would achieve and was prepared to adopt substantially the proposed findings and conclusions of the defendants on this subject, F 1000-F 1010 and C 1000-C 1017, inclusive, prior to the decision in *Texas Industries*." [*Texas Industries, Inc. v. Radcliff Materials, Inc.*, —— U.S. ——, 101 S.Ct. 2061 (1981)].

The view that the defense of claim reduction was foreclosed by the Supreme Court's decision in *Texas Industries* was shared initially by counsel for defendants in this action as expressed in counsel's letter to the court dated May 28, 1981 in which it was stated that

> "Although the facts in *Texas Industries* differ from those here——the case did not involve a settlement between the plaintiff and an alleged co-conspirator, let alone a settlement for a fraction of the plaintiff's total claims—we cannot responsibly characterize these differences as material. We acknowledge that the Supreme Court's rejection of a judicially-crafted rule of contribution significantly undermines the legal, although not the equitable, foundation for our claim reduction defense."

In support of their motion now before this court which in effect asks that the question of claim reduction be reopened the defendants now contend that they and the court were mistaken and that notwithstanding the holding in *Texas Industries* that a cause of action for contribution among antitrust co-conspirators will not be judicially created, the defense of claim reduction remains viable and should be recognized and applied in the exercise of the court's undoubted jurisdiction to fashion remedies in antitrust litigation. In support of their position defendants cite portions of colloquies between Justices of the Supreme Court and counsel during the course of argument on *Texas Industries* and certain language of the Fifth Circuit in the case of *In Re Corrugated Container Antitrust Litigation*, —— F.2d —— (October 29, 1981).

The present motion of the defendants has been vigorously opposed by plaintiffs, but it would serve no useful purpose to restate the arguments pro and con which have been advanced in support of the respective positions of the parties. Suffice it to say that while the issue is by no means free of doubt, the court remains of the opinion pre-

viously expressed on several occasions that this is an appropriate case for the application of the claim reduction defense, and being now persuaded that the issue has not been foreclosed by *Texas Industries,* in the event of remand the court is prepared to enter an amended judgment order as per copy attached excluding from recovery by plaintiffs all damages based on royalties paid by them to Leesona Corporation for which they accepted in compromise settlement the sum of $789, 638.82. Authority for this action is found in Rule 60(b)(6), F.R.Civ.P. *Harman v. Pauley, et al.,* —— F.2d —— (4th Cir., January 19, 1982).[1]

This February 10, 1982.

/s/ F. T. Dupree, Jr.

United States District Judge

1. "F. R. Civ. P. 60(b)(6) allows a district court to vacate its own final judgment 'for any other reason obviously justifying relief from the operation of the judgment.' The rule gives the court such authority to accomplish justice and leaves such determinations to its discretion. We must affirm the district court, therefore, unless we find that the court abused its discretion. *See* C. Wright and A. Miller, *Federal Practice and Procedure* § 2864 (1973)." *Id.*, p. 4 of Slip Opinion.

Pretrial Opinion of the District Court and Order on Damages, August 4, 1980

[Officially unreported]

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

SPARTANBURG DIVISION

Consolidated Civil Action No. 71-306

THE DUPLAN CORPORATION,

Plaintiff

vs.

DEERING MILLIKEN, INC., DEERING MILLIKEN RESEARCH CORPORATION, MOULINAGE ET RETORDERIE DE CHAVANOZ, ATELIERS ROANNAIS DE CONSTRUCTIONS TEXTILES, and ARCT, INC.,

Defendants

ORDER ON MOTIONS AND PRE-TRIAL CONFERENCE

These consolidated antitrust actions in which the liability issues have previously been tried and determined against defendants came on for pre-trial conference at Raleigh, North Carolina on June 6, 1980 at which time counsel for all parties were present and all motions relating to the remaining issue of damages to be tried were heard on oral argument. On the basis of the briefs and argu-

ments of counsel, the previous findings of fact in these cases, the applicable law and the prior appellate proceedings herein the court now makes the following rulings on the pending motions:

I. Plaintiffs' Motion to Limit Scope of Damages Issue.

By this motion the plaintiffs seek to limit the scope of the inquiry at the trial on the issue of damages to evidence relating to the amount of royalties wrongfully collected from the plaintiffs by Deering Milliken Research Corporation (DMRC) and Leesona Corporation (Leesona) in pursuance of an agreement between them heretofore held by this court to have been in violation of the antitrust laws, 444 F.Supp. 648 (1977), growing out of the settlement in 1964 in the case of *Whitin Machine Works* v. *Lessona Corporation,* Civil Action No. 60-313F (D. Mass.), in which the validity of three patents held by Leesona on certain textile machinery was at issue. The defendants on the other hand insist that trial of the damages issue will encompass a variety of additional questions as to which it is necessary that the defendants have extensive discovery. To this end defendants have served upon plaintiffs interrogatories designed to elicit information bearing on such questions as whether in the absence of any wrongdoing the *Whitin* case would nevertheless have been settled, whether trial of the case would have resulted in the establishment of the validity and infringement of the Leesona patents, whether following an adverse decision all of the royalty revenues of Leesona and DMRC would have stopped completely, what effect the loss of royalty income would have

had on the selling price of the textile machines and whether in consideration of the royalties paid DMRC the plaintiffs received services or other things of value in addition to the right to operate the machines licensed to them by DMRC.

This court has held, 444 F.Supp. 648 at page 687, that proof of the payment of royalties by the plaintiffs following the illegal combination found to have existed between DMRC and Leesona sufficed to establish the fact of damage, and the court is now of opinion that proof of the amount of such royalties by plaintiffs will suffice to establish a prima facie case of actual damages subject to diminution by the value of any considerations received by the plaintiffs in return for the royalties such as "support services" allegedly furnished plaintiffs by DMRC during the damages period. With this exception the court is of the opinion that the various questions mentioned above which defendants propose to litigate at the damages trial are not properly before the court and consequently are not proper subjects for discovery prior to the trial.

II. Defendants' Motion to Compel Answers to Interrogatories.

Having ruled in favor of plaintiffs on their motion to limit the scope of the damages issue, it follows that plaintiffs' objections to defendants' interrogatories dated February 15, 1980 should be sustained and defendants' motion to compel answers to its interrogatories Nos. 5a(b), 6, 9, 11, 12, 15(b), 17 and 25 is overruled.

This order is made without prejudice to the right of defendants to have furnished all information called for in interrogatories Nos. 27(a), (b) and (c), 28, 29 and 30.

The objections of plaintiffs are sustained to defendants' request for production of all documents the identification of which has been objected to in connection with defendants' interrogatories and sustained by the court. Plaintiffs' objection to the production of all documents constituting an attorney-client communication or trial preparation material are also sustained.

III. Defendants' Motion to Amend to Assert the Defense of Claim Reduction.

The court has carefully considered the very cogent arguments of able counsel for plaintiffs and defendants on the intriguing question as to whether concepts of contribution and claim reduction should now be recognized in antitrust litigation, and while the court is fully cognizant of the uncertainty of the state of the law on these subjects at this time, it has found appealing the logic of the defendants' position here when considered in the light of the peculiar facts of this case and has therefore concluded that defendants' motion of April 1, 1980 to state the additional affirmative defense of claim reduction as annexed to the motion should be and the same is hereby allowed.

IV. Additional Rulings.

At the pre-trial conference trial time estimates of counsel ranged from as little as two days to as much as several weeks. In view of the limitations placed on the scope of the damages issue by the foregoing rulings the court is of opinion that the trial of this case on the damages issue

should not require in excess of one week. The court recognizes, however, that the case is one of considerable importance to all parties, and the court is prepared to take such time as may prove necessary to give all parties a full and fair hearing. At this time the following schedule is established for the further handling of the case:

1. All discovery shall be completed on or before September 25, 1980.

2. A final pre-trial conference shall be held at Raleigh on October 14, 1980, at 10:00 a.m.

3. The trial on the damages issue will be held at Raleigh beginning Monday, October 27, 1980, at 10:00 a.m.

4. The parties have requested that daily copy be furnished, and the services of Precision Reporting and Transscribing, Inc., court reporters of this court, are available to provide this service.

/s/ F. T. Dupree, Jr.

F. T. Dupree, Jr.
United States District Judge

August 4, 1980.

Original Judgment of the District Court on Damages, July 8, 1981

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

SPARTANBURG DIVISION

Also C/A Nos. 70-14; 71-94; and 71-95

Consol. C/A No. 71-306; C/A No. 69-1096

THE DUPLAN CORPORATION,

Plaintiff,

against

DEERING MILLIKEN, INC., DEERING MILLIKEN RESEARCH CORPORATION, MOULINAGE ET RETORDERIE DE CHAVANOZ, ATELIERS ROANNAIS DE CONSTRUCTIONS TEXTILES, and ARCT, INC.,

Defendants.

DEERING MILLIKEN RESEARCH CORPORATION

Plaintiff,

against

BURLINGTON INDUSTRIES, INC.,

Defendant.

Appendix E

Burlington Industries, Inc. and
Madison Throwing Company, Inc.
Plaintiffs on the Counterclaim,

against

Deering Milliken Research Corporation,
Defendant on the Counterclaim,

and

Deering Milliken, Inc., Moulinage et Retorderie de Chavanoz, Ateliers Roannais de Constructions Textiles, and ARCT, Inc.,
Additional Defendants on the Counterclaim.

JUDGMENT ORDER ON DAMAGES

These cases having been duly consolidated for trial and having come on for trial on the amount of antitrust damages (all liability issues, including fact of damage, having been previously determined) before the undersigned United States District Judge, all parties having waived trial by jury, and witnesses for all parties having been heard, exhibits having been received in evidence, and the Court having heard arguments on the facts and the law and having made its findings of fact and conclusions of law in the Memorandum of Decision filed June 15, 1981, as amended, now, therefore, pursuant to the Memorandum of Decision filed June 15, 1981, as amended, it is

Appendix E

ORDERED, ADJUDGED AND DECREED:

1. The Court has jurisdiction of these actions and each of the parties. 15 U.S.C. §15. Venue is proper in this District.

2. The plaintiffs are Burlington Industries, Inc. (Burlington), a Delaware corporation, and Madison Throwing Company, Inc. (Madison), formerly a North Carolina corporation and now a division of Burlington Industries, Inc.

3. Defendant Milliken & Company (formerly Deering-Milliken, Inc.) is a Delaware corporation which maintains its headquarters and much of its manufacturing operations in South Carolina.

4. Defendant Milliken Research Corporation (formerly Deering Milliken Research Corporation) is a South Carolina corporation and a wholly-owned subsidiary of Milliken & Company.

5. Defendant Chavanoz, S.A. (formerly Moulinage et Retorderie de Chavanoz) is a French "societe anonyme" with its principal place of business in Chavanoz, France.

6. Defendant ASA, S.A. (formerly Ateliers Roannais de Constructions Textiles) is a French "societe anonyme" with its principal place of business in Roanne, France.

7. Defendant ARCT, Incorporated is a North Carolina corporation with its principal place of business in Greensboro, North Carolina.

8. Plaintiff Burlington is entitled to and hereby is awarded all damages properly recoverable by both Burlington and Madison in these actions.

9. Plaintiff Burlington shall have and is hereby granted judgment against defendants Milliken & Company, Milliken Research Corporation, Chavanoz, S.A., ASA, S.A., and ARCT, Inc., jointly and severally, in the sum of Nineteen Million, Four-Hundred Ninety-Four Thousand, Two-Hundred Sixty-One Dollars and Six Cents ($19,494,261.06) with interest thereon from the date of entry of this judgment.

10. In addition, plaintiff Burlington shall have and is hereby granted judgment against defendants Milliken & Company and Milliken Research Corporation, jointly and severally, in the sum of One Million, Four-Hundred and Seven Thousand, Seven-Hundred and Forty-Four Dollars and Thirty-Three Cents ($1,407,744.33) with interest thereon from the date of entry of this judgment.

11. Plaintiff Burlington is entitled to an award of the cost of suit, including a reasonable attorney's fee, the amounts of which remain to be determined. 15 U.S.C. §15. This Court retains jurisdiction for the purpose of ascertaining and awarding the amount of such cost and fee by a separate judgment.

12. The Court directs that the Clerk enter this Final Judgment. In the event it is determined that judgment may not be entered pursuant to Rule 58, Fed.R.Civ.P.,

the Court determines in accordance with Fed.R.Civ.P. 54(b) that there is no just reason for delay in the entry of this final judgment; the Clerk of this Court is, therefore, directed to enter this Final Judgment forthwith.

/s/ F. T. Dupree, Jr.

F. T. Dupree, Jr.
United States District Judge
(Sitting by Designation)

Date: July 6, 1981.

Amended Judgment of the District Court on Damages, March 9, 1982, and Excerpts of the Transcript of the Hearing on the Amended Judgment, March 3, 1982

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Consolidated Civil Action No. 71-306 and
Civil Actions Nos. 69-1096; 70-14; 71-94; and 71-95

BURLINGTON INDUSTRIES, INC., and
MADISON THROWING COMPANY, INC.,
Plaintiffs

vs.

DEERING MILLIKEN, INC., DEERING MILLIKEN RESEARCH CORPORATION, MOULINAGE ET RETORDERIE DE CHAVANOZ, ATELIERS RONNAIS DE CONSTRUCTIONS TEXTILES, and ARCT, INC.,
Defendants

ORDER AMENDING JUDGMENT ORDER ON DAMAGES

These consolidated actions having come upon limited remand from the United States Court of Appeals for the Fourth Circuit, and the court having considered the defendants' motion for an order reducing the judgment order on

damages and the briefs and argument of counsel thereon, and, based on the reasons set forth in the court's memorandum and order of February 10, 1982, as further explained by the Court on the record of a hearing held today, the court having concluded that, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, grounds exist to amend the judgment order on damages previously entered in these cases on July 8, 1981 by giving effect to defendants' defense of claim reduction and that the damages awarded must therefore be reduced to eliminate damages based on royalty payments made by plaintiffs to Leesona Corporation, it is hereby

ORDERED, ADJUDGED AND DECREED:

1. That paragraphs 9 and 10 of the judgment order on damages entered in these cases on July 8, 1981, are hereby vacated.

2. That plaintiff Burlington Industries, Inc. shall have and is hereby granted judgment against defendants Milliken and Company, Milliken Research Corporation, Chavanoz, S.A., ASA, S.A., and ARCT, Inc., jointly and severally, in the sum of SEVEN MILLION ONE HUNDRED THOUSAND EIGHT HUNDRED SEVEN AND 61/100THS ($7,100,807.61) DOLLARS, with interest thereon from July 8, 1981.

3. That plaintiff Burlington Industries shall have and is hereby granted judgment against defendants Milliken and Company and Milliken Research Corporation, jointly and severally, in the sum of THREE HUNDRED SIXTY-ONE

THOUSAND FOUR HUNDRED FOUR AND 06/100THS ($361,404.-06) DOLLARS, with interest thereon from July 8, 1981.

This the 3rd day of March, 1982.

/s/ F. T. DUPREE, JR.

F. T. DUPREE, JR.
United States District Judge

Appendix F

IN THE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

SPARTANBURG DIVISION

Consolidated C/A No. 71-306 & C/A Nos. 69-1096, 70-14, 71-94 & 71-95

Burlington Industries, Inc. and Madison Throwing Company, Inc.

vs.

Milliken Company, Milliken Research Corporation, Chavanoz, S.A., ASA, S.A. and Arct, Inc.

and

The Duplan Corporation, et al,

vs.

Deering Milliken, Inc., Deering Milliken Research Corporation, Moulinage et Retorderie Chavanoz, Ateliers Roannais de Constructions Textiles and Arct, Inc.

Before:

Hon. Franklin T. Dupree, Jr., Chief Judge, For The Eastern District Of North Carolina, United States District Court.

Appendix F

Appearances:

Attorneys for Plaintiffs

Mr. William K. West, Jr.
Cushman, Darby & Cushman
1801 K Street, NW
Washington, D. C. 20006

Mr. David L. Foster
Wilkie, Farr & Gallagher
1 Citicorp Center
153 E. 53rd Street
New York, N. Y. 10022

Mr. McNeill Smith
Smith, Moore, Schell & Hunter
500 NCNB Building
P.O. Box 21927
Greensboro, N. C. 27420

Attorneys for Defendants

Mr. Howard E. Manning
Manning, Fulton & Skinner, P.O. Box 1150,
Wachovia Bank Building
Raleigh, N. C. 27602

Mr. Griffin B. Bell
King & Spalding
1800 M Street, N.W.
Washington, D. C. 20036

Mr. Jay Topkis
Paul, Weiss, Rifkind, Wharton & Garrison
345 Park Avenue
New York, N. Y. 10022

Appendix F

TRANSCRIPT OF HEARING AT ELIZABETH CITY, NORTH CAROLINA, ON MARCH 3, 1982

(9:00 o'clock, a.m., Wednesday, March 3, 1982 at Elizabeth City, North Carolina.)

Mr. McNeill Smith: Good morning, Judge.

The Court: Good morning, gentlemen.

The Duplan case, like [Banquo's] ghost, will not lie down and it intends to make all of the jurisdictions and all of the courtrooms in the Circuit before it is over.

Contrary to an impression which may be abroad, that I devote all of my waking hours to this case, the fact of the matter is that there are some other cases on the docket.

This thing that you are here on this morning came up at a time when I was engaged in the trial of a discrimination case, involving about sixty named plaintiffs. Get Mr. Manning to tell you about it. I believe he was among those present.

And, so I just have not been able to give a lot of time to the case, but I thought for purposes this morning, since that I did review my file last night, that I would begin by seeing if I can identify the problem. Why it is that we are here.

And, as I understand it, it now comes to me that in a proposed Order on remand I have stated that for reasons stated in my Memorandum Order, which was a brief thing entered, what—tenth of February I believe, that—and adopting some language from prior orders, that this was a peculiarly appropriate case for the application of the Claim Reduction Doctrine; and that, maybe if the facts

were otherwise, and some other case, that I would not consider that to be the Law.

And, the plaintiff found that somewhat disturbing because they say that that apparently it is their position now, if I'm stating it incorrectly, of course everybody gets a chance to be heard, and that enables the defendants to go back into the record and dig up a lot of snakes and retry the case because of various shenanigans and shortcuts and things taken by the plaintiffs in achieving this settlement with the—

So that, the defendants might argue in Fourth Circuit that it's this case that we want to apply Claim Reduction to, and forget about all the others. But, if you look back in this record that it ought to be done here whether it's ever done again in any other case or not.

[Material omitted]

I have said and that's—this is the whole basis of the thing, I think it's fair that if the biggest textile company on earth goes out and settles with perhaps the biggest textile machinery company on earth something, and long before they ever come to trial on an issue which I believe I'm not far off in saying that you [plaintiff] won on an issue that you really thought was perhaps a secondary issue and you lost on the one that you put your best foot forward in; and to say that under those circumstances that [plaintiff] could go back and take another defendant in the case and put on them [defendants] all—all of the damages [plaintiff] left what they [plaintiff and Leesona] decided in an arm's length transaction, as you just read me here, I just didn't think it was fair.

And that's the reason I took this position, and that's all I've ever said and it's all I intend to say about the thing.

Now, whether it's the law, you can find out right up the other end of I-95, they've got a research bureau up there that handles these things continuously, and that's—that's just the way I see it.

[Material omitted]

There will be an Order entered amending the Judgment Order on damages, the first paragraph of which will read as follows. You need not take all of this down because I'm going to hand you copies of it, except, well, let's do that right now.

There will be an amendment that will be one line, entered—entered and initialed by me.

Now, when you reach the sixth line following the date February 10, 1982 there will be inserted the following: "As further explained by the Court on the record at a Hearing this day held."

Court is recessed until 10:00 o'clock.

(The Court concluded this Hearing at 9:45 o'clock a.m. on Wednesday, March 3, 1982.)

Judgment of the Court of Appeals, September 23, 1982

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-1823

Burlington Industries, Inc., and
Madison Throwing Company, Inc.,
Plaintiffs-Appellees/
Cross-Appellants,

v.

Milliken & Company, Milliken Research Corporation,
Chavanoz, S.A., ASA, S.A. and ARCT, Inc.,
Defendants Appellants/
Cross-Appellees.

The Duplan Corporation, et al,
Plaintiffs,

v.

Deering Milliken, Inc., Deering Milliken Research Corporation, Moulinage et Retorderie de Chavanoz, Ateliers Roannais de Constructions Textiles, and ARCT, Inc.,
Defendants.

Appeal from the United States District Court for the District of South Carolina.

Appendix G

This cause came on to be heard on the record from the United States District Court for the District of South Carolina, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, vacated. The case is remanded to the United States District Court for the District of South Carolina, at Spartanburg, for further proceedings consistent with the opinion filed herewith.

/s/ William K. Slate, II

Clerk

Appendix G

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

No. 81-1824

Burlington Industries, Inc., and
Madison Throwing Company, Inc.,
Plaintiffs-Appellees/
Cross-Appellants,

v.

Milliken & Company, Milliken Research Corporation,
Chavanoz, S.A., ASA, S.A. and ARCT, Inc.,
Defendants Appellants/
Cross-Appellees.

The Duplan Corporation, et al,
Plaintiffs,

v.

Deering Milliken, Inc., Deering Milliken Research Corporation, Moulinage et Retorderie de Chavanoz, Ateliers Roannais de Constructions Textiles, and ARCT, Inc.,
Defendants.

Appeal from the United States District Court for the District of South Carolina.

Appendix G

This cause came on to be heard on the record from the United States District Court for the District of South Carolina, and was argued by counsel.

On consideration whereof, It is now ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, vacated. The case is remanded to the United States District Court for the District of South Carolina, at Spartanburg, for further proceedings consistent with the opinion filed herewith.

/s/ William K. Slate, II

Clerk

Appendix G

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

No. 81-1825

Burlington Industries, Inc., and
Madison Throwing Company, Inc.,
Plaintiffs-Appellees/
Cross-Appellants,

v.

Milliken & Company, Milliken Research Corporation,
Chavanoz, S.A., ASA, S.A. and ARCT, Inc.,
Defendants Appellants/
Cross-Appellees.

The Duplan Corporation, et al,
Plaintiffs,

v.

Deering Milliken, Inc., Deering Milliken Research Corporation, Moulinage et Retorderie de Chavanoz, Ateliers Roannais de Constructions Textiles, and ARCT, Inc.,
Defendants.

Appeal from the United States District Court for the District of South Carolina.

Appendix G

This cause came on to be heard on the record from the United States District Court for the District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, vacated. The case is remanded to the United States District Court for the District of South Carolina, at Spartanburg, for further proceedings consistent with the opinion filed herewith.

/s/ William K. Slate, II

Clerk

Appendix G

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-1240

Burlington Industries, Inc., and Madison Throwing Company, Inc.,
Plaintiffs-Appellees/ Cross-Appellants,

v.

Milliken & Company, Milliken Research Corporation, Chavanoz, S.A., ASA, S.A. and ARCT, Inc.,
Defendants Appellants/ Cross-Appellees.

The Duplan Corporation, et al,
Plaintiffs,

v.

Deering Milliken, Inc., Deering Milliken Research Corporation, Moulinage et Retorderie de Chavanoz, Ateliers Roannais de Constructions Textiles, and ARCT, Inc.,
Defendants.

Appeal from the United States District Court for the District of South Carolina.

Appendix G

This cause came on to be heard on the record from the United States District Court for the District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, vacated. The case is remanded to the United States District Court for the District of South Carolina, at Spartanburg, for further proceedings consistent with the opinion filed herewith.

/s/ WILLIAM K. SLATE, II

Clerk

Order of the Court of Appeals Denying Rehearing, November 26, 1982

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Nos. 81-1823, 81-1824, 81-1825, 82-1240

Burlington Industries, Inc., et al,
Plaintiffs-Appellees/ Cross-Appellants,

versus

Milliken & Co., et al,
Defendants Appellants/ Cross-Appellees.

The Duplan Corporation, et al,
Plaintiffs,

versus

Deering Milliken, Inc., et al,
Defendants.

ORDER

Upon consideration of the petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is Adjudged and Ordered that the petition for rehearing is denied.

Entered at the direction of Judge Winter with the concurrence of Judge Butzner. Judge Hall dissents.

For the Court,

/s/ William K. Slate, II

Clerk

Selected Findings of Fact from the District Court Opinion on Liability Issues, July 29, 1977

(10) Around 1957, Leesona became aware of the manufacture, sale and use of false twist machines in the United States by companies which did not have licenses under the Leesona patents. Prompted in part by complaints from its licensees, Leesona instituted patent infringement litigation. (76 Tr. 14795 and 14798-800 [Conrad].)

(11) The first suit was commenced in 1957 against Southern Silk Mills, a Tennessee throwster, which had built its own false twist equipment. In defense, Southern Silk asserted that the Leesona '105, '108 and '109 patents were invalid and not infringed. (76 Tr. 14800-04 [Conrad]; Dx 732.)

(12) In 1958, Leesona brought infringement actions against two manufacturers of false twist equipment—Mechanical Specialty Company and Gibbs Machine Company. In the *Gibbs* case, Leesona alleged that Gibbs' false twist machines infringed the Leesona '105, '108 and '109 patents. Gibbs denied infringement and contended that the three patents were invalid. In the *Mechanical Specialty* case, Leesona complained of contributory infringement of its '105 and '086 (spindle) patents based upon the defendant's manufacture and sale to Leesona licensees of a high-speed spindle ("the Smith spindle") designed to replace the slower spindle supplied as regular equipment on the Superloft machine. *Mechanical Specialty* asserted in defense that the '105 and '086 patents were invalid. (Dx 733 at pp. 2-13; 76 Tr. 14804-09 [Conrad].)

(13) Later in 1958, Leesona sued Madison Throwing Company—one of the nation's largest throwsters—and two

affiliated companies. Leesona claimed that Madison, by modifying its Superloft machines to incorporate the Smith spindle and by making other changes, had reconstructed the machines and thereby infringed Leesona's '105 patent. Leesona contended also that Madison's unlicensed use of the Smith spindle infringed the Leesona '086 patent. Madison denied that it infringed either the '105 or the '086 patent; Madison claimed also that the '086 patent was invalid, and that both patents were unenforceable on the ground of misuse. (Dx 733 at pp. 5-7 and 13-17.)

(14) The *Gibbs, Mechanical Specialty* and *Madison* cases were all brought in the United States District Court for the Middle District of North Carolina, and were consolidated for trial. All of the defendants were represented by the same counsel—David Rabin, Esq.—and he was assisted by Thorton H. Brooks, Esq. who was of counsel to defendant Madison and also represented Burlington.* In the consolidated trial, defendants intended to call Dr. Stanley Backer (who testified for plaintiffs here) as an expert witness to testify about the alleged invalidity of Leesona's '105, '108, '109 and '086 patents. (Dx 733 at pp. 1, 73, and final page [unnumbered]; 76 Tr. 14804-09 and 14881-82 [Conrad].)

(35) In April 1963, Leesona settled the *Gibbs, Mechanical Specialty* and *Madison* cases (see ¶¶ 12-14 above).

[Material not adopted.]

(76 Tr. 14805, 14943-44, 14948 and 14962 [Conrad].)

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* In 1958, Burlington owned 50% of Madison; by the spring of 1960, Burlington had a majority interest. (13 Tr. 2653 [Norman].)

(36) The settlement was reached after the talks were initiated by Dalton McMichael of Madison within a month of the scheduled trial date. While Gibbs and Mechanical Specialty were nominally involved, Madison and Burlington orchestrated the settlement on behalf of the defendants: in the negotiation, Leesona dealt with Douglas Orr, Burlington's general counsel, and Thornton Brooks, its outside counsel. (76 Tr. 14804-09 and 14881-82 [Conrad]; Dx 137-485.)

(37)

[Material not adopted.]

Madison and Burlington took Leesona's standard license under the '105, '108, '109 and '247 (spindle) patents which provided for payment of royalties on the production of the Leesona equipment (with the exception of unmodified Model 550 machines which had always been royalty-free). This license was also executed by Madison's two co-defendants—MacField Industries and Nylon Processing Co. In addition, Burlington and Madison agreed to make substantial payments to Leesona in discharge of Leesona's claims of infringement for the period before the settlement: $172,500 by Burlington and $93,000 by Madison. Madison also consented to a final judgment decreeing the validity of Leesona's '105 and '086 patents (the two patents directly involved in the Madison branch of the case—see ¶ 13 above) and dismissing Madison's counterclaim with prejudice. (Dx 125-4113; Dx 126-4878; Dx 647-4114a; Dx 648-4114b; Dx 81-4116; Dx 124-4115; Dx 123-1800; 76 Tr. 14883 [Conrad].)

[Addition by the Court: "In the case of Gibbs and Smith, they took a Leesona manufacturer's license in which *Leesona paid them* to sell to its licensees while there were lucrative side deals in favor of both Madison and Burlington." (see PX 1249; PX 1250; Tr. Vol. 83, pp. 16,096-103)]

(38) Gibbs and Mechanical Specialty took Leesona's standard manufacturer's license under the '105, '108 and '109 patents. Gibbs consented to a final judgment decreeing the validity of the '105, '108 and '109 patents. Mechanical Specialty consented to a judgment decreeing the validity of the '105 and '086 patents (those directly involved in its branch of the case—see ¶ 12 above). (Dx 649-4120; Dx 650-4121; Dx 645; Dx 646.)

(39) Burlington and Madison settled their controversy with Leesona—and eschewed a court test of the Leesona patents—despite having been offered assistance in the litigation by DMRC and despite having possession of the opinion of DMRC's outside patent counsel that the Leesona patents should be held invalid.

[Material not adopted.]

Pretrial Order of the District Court Bifurcating the Trial, April 2, 1976

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

Consolidated Civil Action No. 71-306

THE DUPLAN CORPORATION,

Plaintiff

vs.

DEERING MILLIKEN, INC., DEERING MILLIKEN RESEARCH CORPORATION, MOULINAGE ET RETORDERIE DE CHAVANOZ, ATELIERS ROANNAIS DE CONSTRUCTIONS TEXTILES, and ARCT, INC.,

Defendants

PRE-TRIAL ORDER NO. 76-1

Pursuant to an order of the Honorable Clement F. Haynsworth, Jr., Chief Judge, United States Court of Appeals for the Fourth Circuit, dated January 30, 1976, designating and assigning the undersigned to hold a district court in the District of South Carolina during the period beginning February 1, 1976 and ending December 31, 1976, and for such additional time thereafter as may be required to complete unfinished business, a preliminary pre-trial conference was held by agreement of counsel for all parties at Raleigh, North Carolina on March 26, 1976. Counsel for

all the parties in the thirty-seven actions which have been consolidated for trial under the above caption were present for the conference, the purpose of which was to allow counsel to inform the court of the present status of the case, establish a trial format, pre-trial schedule, tentative trial date, place of trial and any other matters necessary to be considered and determined prior to the commencement of the trial. After the introduction of counsel to the court the following proceedings ensued:

1. Counsel presented in a general way their respective positions concerning the contract, antitrust and patent issues raised by the pleadings in this litigation and made known to the court their positions with respect to the other matters on the agenda for the conference.

2. Provided the trial of the cases is commenced before the undersigned, all parties except The Duplan Corporation (and perhaps others represented by the same counsel as Duplan) agreed in open court to waive trial by jury. As counsel for Duplan Mr. David C. Foster stated that it would have been the preference of his clients to have the case tried to a jury, but he conceded in open court that demand for a jury trial had not been timely lodged and that it was no longer open to his clients to demand a jury trial. The case will therefore be tried without a jury.

3. The parties to this litigation fall into two groups each of which has cognate interests. Those parties resisting the contract actions of Deering Milliken Research Corporation (DMRC) for the recovery of royalties and at the

same time asserting claims under the antitrust and patent laws against DMRC, Deering Milliken, Inc. (DMI), Moulinage et Retorderie de Chavanoz (Chavanoz), Ateliers Roannais de Constructions Textiles (ARCT-France), and ARCT, Inc., have heretofore been designated and referred to as "the Throwsters". Each side pressed its claim to the right to present its case first at the trial. The question was not resolved at the conference, but since that time the matter has been thoroughly considered by the court, and it has been concluded that notwithstanding the royalty contract action of DMRC was first filed in point of time, the real battle in the lawsuits is going to be waged on the antitrust and patent issues, and since the Throwsters will have the burden of proof on each of these issues, the trial will proceed more orderly if the Throwsters are permitted to present their case first. The court understands that a stipulation will be entered into which will designate the patents and the claims therein which will be litigated, and this stipulation together with the patents will be received as the first evidence in the case. The Throwsters who will hereafter be referred to as "the plaintiffs", will then present their evidence to be followed by the evidence for DMRC, DMI, Chavanoz, ARCT-France and ARCT, Inc., who will hereafter be referred to as "the defendants".

4. All issues in the cases have been consolidated for trial except that the issue of the amount of damages, if any, shall be reserved for subsequent proceedings following determination of liability.

5. The defendants have agreed to furnish the plaintiffs on or before April 10, 1976 a list of all the patents and the claims in each patent which they will assert at the trial.

6. The following timetable will be observed prior to the final pre-trial conference:

On or before April 26, 1976 counsel will simultaneously exchange:

a. proposed stipulations of fact;

b. list of exhibits;

c. designations of portions of depositions to be read in evidence;

d. lists of witnesses with a brief statement in writing of what counsel proposes to establish by the testimony of each witness.

On or before May 17, 1976 counsel will simultaneously exchange:

a. list of further stipulations;

b. list of further exhibits;

c. list of additional deposition testimony to be designated, if any;

d. list of additional witnesses;

e. statements of objections with reasons to deposition testimony and exhibits previously designated by opposing parties;

On or before May 24, 1976 counsel will meet and undertake to resolve all evidence questions raised by objections previously interposed to exhibits and deposition testimony and at that time will list any further objections to exhibits and deposition testimony as a result of the May 17 exchange.

The final pre-trial conference will be held in Courtroom No. 1, Seventh Floor, Federal Building, 310 New Bern Avenue, Raleigh, North Carolina, at 10:00 a.m. on Friday, June 4, 1976.

7. Prior to the trial the plaintiffs will comply with the provisions of 35 U.S.C. § 282(4).

8. Proposed findings of fact need not be filed prior to the trial but will be required within ten days after the evidence is concluded.

9. Trial briefs are to be filed on or before the date set for the pre-trial conference.

10. All exhibits are to be marked with their final exhibit numbers and lised on exhibit sheets prior to the trial. Exhibits not offered in evidence will be deleted from the exhibit sheet at the time of the trial.

11. Deposition testimony designated in the April 26 and May 17 exchange will be read into the trial record in question-and-answer form at the trial.

12. Included in the stipulations to be filed by the parties will be an agreement waiving all formalities with respect to the taking of the deposition testimony to be offered.

13. On reasonable notice all parties have agreed to have their employees who are residents of this country present at the trial when their presence is deemed necessary by the party requesting it. Any stipulations or orders presently

existing respecting the presence at the trial of foreign witnesses will be observed. In the absence of such stipulation or order if the parties are unable to agree, the court will resolve the matter.

14. The parties have expressed the desire to have the trial reported on a daily copy basis, and two reporting services have expressed an interest in bidding on the work. They are Mr. Haines Dennis, Interstate Daily Transcripts, Professional Building, 666 Georgia Avenue, Chattanooga, Tennessee, 37402, Telephone (615) 267-0989, and Mr. C. L. Hollifield, Hollifield Reporting Service, 430 West Friendly Avenue, Greensboro, North Carolina, 27410, Telephone (919) 273-4211. The matter of selecting and compensating the reporting service is left to the parties subject to final approval by the court.

15. There is pending in the Court of Appeals for the Fourth Circuit an interlocutory appeal from an order involving the admissibility of certain documents proposed to be offered at the trial of this action. It is hoped that the decision of the Court of Appeals will be handed down prior to the scheduled final pre-trial conference, but the court does not consider the pendency of this appeal as sufficient cause for deferring the establishment of a trial date and the other schedules set forth herein. Should any party feel the need for conducting further discovery as the result of an adverse ruling concerning the admissibility of the exhibits involved in the pending appeal this court will consider and rule upon any motion which may be filed for this purpose.

16. The plaintiff, Burlington Industries, Inc., has pending three motions for summary judgment which apparently were not ruled upon by the Honorable Robert Hemphill, the Judge to whom this case was previously assigned, and counsel for Burlington and the defendants are not in agreement as to whether this court should now hear and determine these three summary judgment motions. Counsel are allowed to and including April 9, 1976, in which to furnish the court with written statements of their respective positions concerning this matter, and the court will shortly thereafter make a determination as to the manner in which these motions will be handled.

17. The parties will undertake to stipulate as to the admissibility of certain evidence taken in other litigation which may be offered in evidence at the trial of these actions. In the event the parties are unable to agree, the court will rule on the admissibility of any such proposed evidence at the time it is offered.

18. The subject of settlement was briefly discussed, but the prospects of settlement appear to be poor at this time. Counsel will continue their discussions, but inasmuch as this will be a non-jury trial, the court is not to be informed as to any offers or counter-offers which may be made during the course of settlement negotiations.

19. The estimated trial time for the case is four months. The trial will begin at Rock Hill, South Carolina at 10:00 a.m. on Monday, June 14, 1976, and continue for two weeks. The trial will then be recessed until Monday, July 12, 1976

at 10:00 a.m. at which time it will continue for two more weeks. The trial wil lthen be in recess for three weeks and will be resumed at 10:00 a.m. on Monday, August 16, 1976 for two weeks. The trial will then be in recess for one week and one day and will be resumed on Tuesday, September 7, 1976 at 10:00 a.m. Thereafter the trial will be recessed every third week until it is completed.

/s/ F. T. Dupree, Jr.

F. T. Dupree, Jr.
United States District Judge

April 2, 1976.

No. 82-1410 and No. 82-1421

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MILLIKEN RESEARCH CORPORATION and CHAVANOZ, S.A.,
Petitioners,

—v.—

BURLINGTON INDUSTRIES, INC., *et al.*,
Respondents.

MILLIKEN & COMPANY,
Petitioner,

—v.—

BURLINGTON INDUSTRIES, INC., *et al.*,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

DAVID L. FOSTER
(*Counsel of Record*)
WILLKIE FARR & GALLAGHER
153 East 53rd Street
New York, New York 10022
(212) 935-8000

MCNEILL SMITH
(*Counsel of Record*)
SMITH, MOORE, SMITH,
SCHELL & HUNTER
P.O. Box 21927
Greensboro, North Carolina 27420
(919) 378-1450

Attorneys for Respondents

Of Counsel:

MICHAEL R. ABEL
MICHAEL C. LAMBERT
JAMES J. CALDER
WILLIAM K. WEST, JR.
W. WARREN TALTAVULL
LAURENCE H. LENZ, JR.
O. G. CALHOUN

QUESTIONS PRESENTED

Because Petitioners assert the existence of questions which are, in fact, not presented by the record in this litigation, a reformulation of their statement of questions is necessary.

1. In bifurcated antitrust litigation without a jury where an initial trial and appeal have established that royalty payments were the result of an antitrust violation, the purpose of which was to cause such payments to be made, are the lower courts precluded from adopting a trial format in the damages phase of the litigation in which the stipulated payments resulting from the violation are deemed *prima facie* proof of damages, with defendants having "the opportunity to prove that the actual royalties paid do not in fact equal the overcharge which is the true measure of plaintiffs' damages"? [Milliken Research Corporation Question 1; Milliken & Company Question 3]

2. In bifurcated antitrust litigation without a jury, may the lower courts establish a format in which the second trial will be confined to amount of damages, with issues of violation and causality to be determined at the initial trial, with the result that defendants will be precluded from litigating at the damages trial a causality defense in the nature of *in pari delicto* which was not presented, and indeed was contrary to defendants' contentions, at the initial trial? [Question 2 in both petitions]

3. Is the tort concept of "claim reduction," which has never been applied by any court except as an adjunct to a rule permitting contribution among joint tort-feasors, available in an antitrust case to reduce a plaintiff's total recovery to less than the statutory "threefold the damages by him sustained" by reason of the antitrust violation, despite the unavailability of contribution in antitrust cases under this Court's recent decision in *Texas Industries, Inc.*

v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981). [Milliken Research Corporation Question 3; Milliken & Company Question 1]

4. Where the damages claim of a corporate party includes damages originally inflicted on a subsidiary of that party to which the party succeeded by merger, does due process impose upon the corporate party a special duty of notification concerning its damages claim apart from, and in addition to the duties of that party under, the Federal Rules of Civil Procedure? [Milliken Research Corporation Question 4]

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption and identified in the Petitions filed by Milliken & Company and Milliken Research Corporation, Madison Throwing Company, Inc. is a party to this proceeding. Burlington Industries, Inc. has certain affiliates, other than wholly-owned subsidiaries, which are identified below:

Burlington AG
Fibras Textiles de Mexico, S.A. de C.V.
Mitsubishi Burlington Company, Limited

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No. 82-1410 and No. 82-1421

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MILLIKEN RESEARCH CORPORATION and CHAVANOZ, S.A.,

Petitioners,

—v.—

BURLINGTON INDUSTRIES, INC., *et al.,*

Respondents.

MILLIKEN & COMPANY,

Petitioner,

—v.—

BURLINGTON INDUSTRIES, INC., *et al.,*

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

Respondents Burlington Industries, Inc. ("Burlington") and Madison Throwing Company, Inc. ("Madison") (sometimes collectively referred to herein as "Respondents" or "Burlington"), submit this brief in opposition to the Petitions for Writs of Certiorari filed by Petitioners Milliken Research Corporation (formerly known as Deering Milliken Research

Corporation and referred to herein as "DMRC") and Chavanoz, S.A. ("Chavanoz") in No. 82-1410 ("DMRC Pet.") and by Milliken & Company ("Milliken") in No. 82-1421 ("Milliken Pet.").[1] Both Petitions seek review of the same decision below. By order of this Court dated March 11, 1983, this Brief will respond to both Petitions.

STATEMENT OF THE CASE

At the liability stage of this bifurcated litigation, the district court held that Petitioners had engaged in a *per se* violation of the antitrust laws by reason of a horizontal combination with Leesona Corporation ("Leesona"), their only significant competitor in the licensing of false twist textile machines. The court further ruled that by reason of that illegal conduct—which entailed an agreement to "stabilize and maintain" the parties' respective royalty programs on those machines—Respondents, who operated and paid royalties on such machines, suffered injury to their business and property within the meaning of section 4 of the Clayton Act, 15 U.S.C. § 15 (1976). *Duplan Corporation* v. *Deering Milliken, Inc.*, 444 F. Supp. 648 (D. S.C. 1977). Those holdings were sustained on appeal, 594 F.2d 979 (4th Cir. 1979), and this Court denied petitions for writs of certiorari filed by Petitioners, 444 U.S. 1015 (1980).

The district court, pursuant to its earlier bifurcation order, then conducted a trial on the sole issue of the amount of damages sustained by Respondents. In light of the findings that had been made at the liability trial, the district court issued pretrial rulings setting forth the order of proof at the damages trial and excluding certain evidence which Petitioners sought to present. Petitioners' Joint Appendix ("J.A.") 75-79. At the conclusion of the trial, the district court entered judgment for Respondents (J.A. 81) in an amount which was later

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1 DMRC, Chavanoz and Milliken are collectively referred to herein as "Petitioners."

reduced after Petitioners made a belated argument concerning their defense of "claim reduction" (J.A. 87).

The court of appeals affirmed the district court's ruling with respect to the order of proof at the damages trial (J.A. 11, 690 F.2d 380, 386 (4th Cir. 1982)), but reversed on the "claim reduction" issue, ruling that the court was in error in recognizing such a defense (J.A. 22-31, 690 F.2d at 391-95). In addition, while agreeing that some evidence was properly excluded by the district court (J.A. 12-15, 690 F.2d at 387-88), the court of appeals took a broader view than did the district court of the issues which remained open at the damages trial and, therefore, vacated the judgment and remanded for consideration of certain other excluded evidence (J.A. 11, 690 F.2d at 386).

Thus, the case is before this Court in an interlocutory posture with the parties who are seeking review having succeeded in the court of appeals in having a judgment vacated and the case remanded for a new damages trial. In their effort to persuade this Court to intervene at an intermediate stage of the case, Petitioners have distorted almost beyond recognition the rulings actually made below. They have also filed separate petitions on behalf of a parent corporation and its wholly-owned subsidiary (which were jointly represented in the courts below), obscuring the same misstated issues in different garb. Furthermore, Petitioners are simply being disingenuous when they suggest (*e.g.*, Milliken Pet. at 10) that the issues which they attempt to raise are not "fact-bound" and, therefore, will have broad application to antitrust cases in general. To a very considerable extent, the rulings of the courts below are the product of the highly unique and specialized set of facts presented by the record of this particular case and, Respondents respectfully submit, its teachings will not provide widespread guidance for future cases.

The Parties. There were two defendants below which are not petitioners here; they were sellers of good quality false twist textile machines used to texture synthetic yarn. Petitioners, on the other hand, were purveyors of coerced licenses

under a portfolio of worthless patents, every one of which was finally adjudged at the liability stage of this litigation to have been invalid and/or non-infringed, as well as unenforceable by reason of patent misuse.

Specifically, Petitioner Chavanoz was the owner of twenty-two patents purporting to cover alleged product and process improvements for ARCT false twist textile machines operated by Burlington and other yarn texturers (who are known in the trade as "throwsters"). That portfolio, now wholly discredited, was the ostensible basis for the exaction of production royalties from Burlington and other throwsters by Petitioners.

Chavanoz purportedly granted to DMRC the exclusive right to use in the United States false twist machines embodying the improvements claimed in the Chavanoz patents. It is critically important to note that DMRC did not make, sell or receive compensation from the sale of false twist machinery. DMRC's sole function was to collect so-called use royalties on the operation of the false twist machines after they were sold (which royalties were then split with Chavanoz).

The machines were manufactured by Chavanoz' manufacturing and selling licensee, defendant Ateliers Roannais de Constructions Textiles ("ARCT-France") and sold in the United States to Whitin Machine Works ("Whitin") and later to ARCT-France's American subsidiary, defendant ARCT, Inc., which, in turn, sold them to American throwsters, such as Respondents.[2] ARCT-France and ARCT, Inc. derived revenue only from the sale of false twist machines. They did not collect or share in the illegal royalties collected by DMRC.[3]

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2 DMRC, Chavanoz, Milliken, ARCT-France and ARCT, Inc. are collectively referred to herein as "defendants."

3 DMRC, in concert with Chavanoz, ARCT-France and its distributors Whitin and later ARCT, Inc., required purchasers of ARCT machines to sign a standard, printed form production royalty agreement in order to obtain delivery of the false twist machines that they had purchased from Whitin or ARCT, Inc. "The royalty system," the Court of Appeals for the Fourth Circuit stated in its decision on liability issues in this case, "depended upon the restriction of machine

Prior to the commencement of this litigation in 1969, virtually the entire United States market in false twist machines was shared by the ARCT and Leesona machines. 444 F. Supp. at 686. Leesona not only manufactured false twist machines but was also the owner of its own false twist patents relating to machines and processes and, in parallel with defendants, also required purchasers of its machines, such as Burlington, to sign a license imposing production royalties. *Id.* at 675-76.

Respondents were the victims of the illegal royalty preservation agreement between defendants and Leesona. As a result of that unlawful combination, Burlington and Madison were damaged by the payment of more than $7,756,000 in royalties during the applicable damages period (J.A. 49). After nearly fourteen years of litigation, however, Respondents have yet to recover one penny of those damages from defendants.

The Antitrust Violation That Was Established at the Initial Trial on Liability. The essence of the antitrust violation found by the district court at the liability stage of this case was that Petitioners and Leesona agreed to preserve their mutually interdependent royalty programs against the threat of destruction. The principal threat was patent litigation between the competitors involving allegations by Leesona that its false twist patents were infringed by ARCT machines. The competitors agreed to abandon that litigation by settlement in 1964, not for the purpose of resolving a legitimate controversy as to patent coverage, but upon the express recognition that the trial and disposition of the case would undermine their interdependent royalty programs. They, therefore, acted jointly to insure that the patents of both would be preserved and the production royalty programs would continue. The sales prices of the machines themselves were not the subject of the illegal combination or the resulting *per se* violation of the Sherman Act.

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deliveries to DMRC use licensees. . . ." 594 F.2d at 982. As a result of their role in such restrictions, ARCT-France and ARCT, Inc. were found by the court of appeals to be liable as co-conspirators despite the fact that they did not share in the illegal royalties.

This was made clear by the district court's holding in its 1977 liability opinion that "there accompanied the settlement of March 31, 1964, the intent and an implicit agreement to stabilize and maintain production royalty rates. . . ." 444 F. Supp. at 683. In affirming *per curiam* on the basis of the district court's "thorough, explicit and sound" opinion, the court of appeals characterized the 1964 settlement as "the core of a scheme to stabilize and maintain production royalties on false twist machines and to monopolize the United States market for these machines." 594 F.2d at 981-82.

The district court expressly found that the respective royalty programs of DMRC/Chavanoz and Leesona were interdependent—that one could not exist without the other—and that that interdependence was not only perceived and admitted by defendants and Leesona, but their recognition of it was the subject of repeated communications. 444 F. Supp. at 682, 685-87. It also held that DMRC, Chavanoz and Leesona entered into the 1964 settlement of their patent litigation with a "dominant purpose" which was anticompetitive, that purpose being "to preserve and enhance the interdependent royalty programs of Leesona and Chavanoz/DMRC which a trial of the pending litigation might well have destroyed." *Id.* at 682. The district court found that:

> As the case wore on it became more and more apparent to both sides that the results of victory might well be outweighed by the possibility of facing unlicensed competition in the false twist machinery market, a thought epitomized in Leeson's [President of Leesona] statement to Armitage [DMRC representative]: "*If you win you lose, and if you lose, you lose—because if the patent is broken, there will be no royalty*". . . . This thinking finally prevailed, and the settlement of March 31, 1964 with its trade-restraining, anti-competitive results soon followed.

Id. at 687 (emphasis added).

It was established at the liability trial, therefore, that the settlement had an anticompetitive effect and was entered into with a purpose that was also anticompetitive. As the district court found, "the underlying tenet of the settlement discussions between defendants and Leesona was one which [Leesona's president] expressed succinctly in August 1963: 'Everything to settle so that all competitors [charge] a royalty.' " (Respondents' Appendix[4] 1; *see* 444 F. Supp. at 679).[5]

Another threat to the royalty programs was the emergence of unlicensed competition, which Petitioners and Leesona agreed and acted jointly to squelch, the district court found, in order to protect their own licensing programs from royalty-free machines of others. 444 F. Supp. at 681, 686.

In the course of the formation and execution of the combination, defendants and Leesona were found by the district court to have done virtually all of the things that have become the hallmarks of illegal horizontal conduct. They not only discussed their mutual interest in royalty collection and the total interdependence of their royalty programs, but they also "agree[d] in principle" that production royalties from American throwsters should be shared (*Id.* at 678-79), and even agreed to conceal their illicit undertaking by agreeing orally that " 'there is no reason for us [DMRC] to reduce royalties unless you [Leesona] force us to do so' " and, upon that understanding, deleting from their written settlement agreement a provision which, in effect, put a penalty on reducing royalties. *Id.* at 680.

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4 Respondents' Appendices are found at the back of this brief and references thereto appear as "R.A."

5 The anticompetitive purpose was also aptly summarized by a Whitin representative in a statement to one of the throwsters: "They [Whitin, DMRC and Chavanoz] did feel they had plenty of evidence to knock the [Leesona] patents out but in this case there would have been no royalty collected by Leesona which would have made it all the harder for ARCT to collect any royalty." (R.A. 2). That same person also made the observation that if the Leesona royalty program falls "the whole system of licenses . . . is doomed to failure." (R.A. 3).

The agreement between the competitors to (in the words of one of the circuit judges at the argument of the liability appeal) "ensure that production royalties would be" was correctly treated by the courts below as a form of price fixing. However, neither the district court nor the court of appeals, in either liability or damage opinions, found that a purpose of the combination was to maximize total return from the sale of false twist machines. The lower courts did not make such findings because this case—unlike the typical price fixing case—did not involve fixing the sales price of the false twist machines. Rather, it involved the imposition of a separate, easily identifiable charge on the throwsters who used the machines. That charge was the royalty. Thus, the conspirators, by their own actions, measured the amount of the overcharge by separating it from the machine price and, with respect to defendants' machines, by requiring that it be paid to someone other than the seller of the machine. This key factor makes this case quite rare and robs it of precedential value for routine price fixing cases. Accordingly, this case, while important to the parties (and, at an earlier stage, to the entire American throwster community which was enslaved by these royalty programs), presents legal issues in a factual framework that is remote from typical antitrust litigation.

The Liability Trial and Appeal Established That Royalties Constituted Antitrust Damages. In ruling for Respondents on liability, the district court made the finding requisite to a holding of liability under section 4 of the Clayton Act (15 U.S.C. § 15) that Respondents had demonstrated injury to their business and property as a result of Petitioners' antitrust violations (a concept variously referred to in antitrust cases as "causality," "impact" or "fact of damage").[6] Thus, prior to the damages trial, the district court had found a causal connection between the violation and payment of the royalties and it had specifically determined that the payment of royalties to DMRC constituted evidence of damage:

6 *See, e.g., Response of Carolina, Inc.* v. *Leasco Response, Inc.*, 537 F.2d 1307, 1320, 1321 n.34, 1324 (5th Cir. 1976).

> On the question of the impact these results had on the plaintiffs it is not seriously challenged that unless the plaintiffs in this action signed the DMRC use license and paid the required royalties they could not obtain the ARCT machines which they badly needed in their businesses. The sizable royalty income collected by DMRC in the years following the settlement affords graphic proof of the impact which the program had upon those businesses. The court concludes that as a direct consequence of the violations of Sections 1 and 2 of the Sherman Act by DMRC and Chavanoz the plaintiffs have been injured in their business and property within the purview of 15 U.S.C. § 15.

444 F. Supp. at 687.

Contrary to Milliken's representation (Milliken Pet. at 15), the district court also found that fact of damage was established by reason of Respondents' royalty payments to Leesona. It was one of the effects of the combination, the court found, that "after 1964, each of the plaintiffs paid production royalties to DMRC and those plaintiffs that operated Leesona machines or machines of Leesona's manufacturer's licensees also paid production royalties to Leesona." (R.A. 4; *see also* 444 F. Supp. at 692). In short, Respondents were victimized when they paid the royalties which it was the purpose of the conspiracy to exact.[7]

These findings of causality were unanimously affirmed by the court of appeals in the face of an all-out attack by Petitioners. 594 F.2d 979. The same assault on the causality determination was mounted in subsequent petitions for writs of certiorari and those writs were denied. 444 U.S. 1015.

The Decisions Below on Damages. Based on the fact of damage and other findings at the liability trial, the district

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7 *See Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 697 (1962).

court issued its order of August 4, 1980 ("August 4 Order") (J.A. 75-79) delineating the proper scope of the issues remaining to be tried on the amount of damages sustained by Respondents. The August 4 Order had two facets. First, it established that, at the damages trial, proof of the royalty payments made by Burlington "will suffice to establish a *prima facie* case of actual damages subject to diminution by the value of any considerations received by the plaintiffs in return for the royalties . . ." (J.A. 77). Second, the August 4 Order established that certain damage defenses—all but one of which Petitioners had previously raised on appeal from the liability opinion in an unsuccessful attack on the fact of damage holding—were no longer "properly before the court." (J.A. 77).[8] The damages case was tried pursuant to the August 4 Order and, at the trial, defendants stipulated to the amount of royalty payments made by Respondents.

On appeal, Petitioners attacked both parts of the August 4 Order. The court of appeals affirmed that part of the Order which made proof of the royalty payments *prima facie* proof of damages, but reversed the second part of the Order, vacated

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8 Indeed, in their petition for a writ of certiorari from the court of appeals' decision affirming the district court's fact of damage finding at the liability trial, Petitioners argued that proof of fact of damage rested on a "chain of assumptions which were not and never could have been proven." In that petition, DMRC and Chavanoz, for example, claimed that "there is no way, we submit, for mortal man to do anything but guess as to whether any of these assumed 'facts' would have occurred, to what degree, and when, had the settlement not taken place." Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, filed on behalf of DMRC and Chavanoz in *Deering Milliken Research Corp.* v. *Duplan Corp.*, No. 79-658 at 23 (relevant excerpts from that petition are set forth in R.A. 5). Petitioners now seek to force Burlington to prove this "unprovable" chain of assumptions at the damages trial despite the fact that it has long been established that an antitrust plaintiff's burden in proving amount of damages is an easier one than establishing fact of damage and that the risk of uncertainty is on the wrongdoer. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 582 (1931); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946).

the judgment and remanded for a new trial to give defendants the opportunity to introduce certain evidence which had been precluded by the district court to attempt to overcome Respondents' *prima facie* case (J.A. 11, 690 F.2d at 386).

Despite having succeeded on appeal in having the case remanded for additional evidence and a retrial of the damages issues, Petitioners have filed petitions for writs of certiorari seeking reversal of the *prima facie* ruling contained in the August 4 Order and sustained by the court of appeals. They also seek to have this Court review (a) the court of appeals' affirmance of a ruling by the district court excluding certain other evidence relating to causality, expressed in terms of an *in pari delicto* defense, which was not presented, and indeed was contrary to Petitioners' contentions, at the liability trial during which the issue of causality was litigated; (b) the refusal of the court of appeals to recognize the unprecedented defense of "claim reduction" and thereby reduce Respondents' damages to less than the statutorily prescribed amount; and (c) an issue relating to the specificity with which damages claims must be pleaded under the Federal Rules of Civil Procedure—an issue which Petitioners have attempted to raise to a constitutional level.

REASONS FOR DENYING THE WRIT

I.

THE RULING BY THE COURT BELOW THAT PROOF OF AMOUNT OF ROYALTIES CONSTITUTED *PRIMA FACIE* PROOF OF AMOUNT OF DAMAGES IS A PROPER EXERCISE OF DISCRETION AND RAISES NO ISSUE WORTHY OF REVIEW BY WRIT OF CERTIORARI.

The August 4 Order (J.A. 75-79) was not only correct but was required by the findings and conclusions reached in the prior liability trial. It was nothing more than a routine exercise by an experienced trial judge in a bench trial of his unquestioned power to define the issues for trial on the basis of the particular facts of the case and the findings previously made by him and affirmed by the court of appeals after an eight month trial on liability.

Although the court of appeals disagreed with the district court with respect to the scope of the evidence which should have been considered at the damages trial and, therefore, remanded for retrial, it expressly noted that the case "presents no dispute about the governing principle for the measurement of damages in a price-fixing case" (J.A. 7, 690 F.2d at 385) and sustained the *prima facie* ruling made, as a matter of discretion, by the district court against a record replete with complex and unique facts and findings. This Court does not ordinarily sit to review such "fact-bound," discretionary decisions, especially when the legal standard is not in dispute and there is no final judgment. *E.g.*, *Graver Tank & Manufacturing Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924). This case affords no basis for departing from that normal practice.

A. The Decision Below Was Based on a Routine Application of Established Principles for Defining the Issues and Order of Proof in Damages Trials.

As outlined above, the essence of the illegal combination found by the district court was to preserve the interdependent royalty collection schemes against the threat of total destruction ("there will be no royalty." *See* p. 6, *supra*). On the basis of those findings and other evidence, the district court at the liability trial also found that royalty payments were a "direct consequence" of the antitrust violations, and the court of appeals affirmed.

Despite these strong findings of causality, the court of appeals did not rule, as Petitioners claim, "that damages from a price-fixing conspiracy equal treble the full amount of the fixed element of the total price . . ." (DMRC Pet. at 12). While such a ruling might have been justified given the prior findings, it was not made and, therefore, the issue which Petitioners purport to raise (Milliken Pet., Question 3; DMRC Pet., Question 1) is not presented by this record. To the contrary, the August 4 Order specifically left open the question whether any portion of the royalties was attributable to anything other than the violation—*i.e.*, "the value of any considerations received by the plaintiffs in return for the royalties" (J.A. 77)—and at trial the district court heard extensive evidence presented by Petitioners as to such considerations (*see* J.A. 61-65).[9] The court of appeals went even further, ruling that upon remand the damages trial issues should include additional evidence excluded by the August 4 Order from which Petitioners might attempt to demonstrate that the

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9 The district court in fact found that ten percent of the royalties paid to DMRC and five percent of the royalties paid to Leesona were attributable to "other considerations" in the form of so-called "technical support services" (J.A. 64), a finding that was affirmed by the court of appeals (J.A. 20-22, 690 F.2d at 390-91). Since that finding must be taken into consideration on remand, Respondents' damages, in any event, will not be based on the full amount of the royalties paid.

amount of damages was less than total royalties (J.A. 11, 690 F.2d at 386).

It is, therefore, fatuous to suggest (*see* DMRC Pet. at 12-13) that the ruling below espouses a rule of "automatic damages." Moreover, throughout the damages trial it was recognized that the ultimate burden remained upon Respondents to prove the amount of damages which resulted from the violation. To the extent that the *prima facie* part of the August 4 Order established the order of proof at the damages trial, it was clearly within the court's discretion and plainly could not have constituted prejudicial error. 6 J. Wigmore, *Wigmore on Evidence* § 1867 (Chadbourn rev. 1976); *Philadelphia & Trenton Railroad* v. *Stimpson*, 39 U.S. 448 (1840).

The clear propriety of the court of appeals' affirmance of the *prima facie* portion of the August 4 Order is demonstrated by the very decisions of this Court cited in the Milliken and DMRC Petitions. For example, in *Westinghouse Electric and Manufacturing Co.* v. *Wagner Electric and Manufacturing Co.*, 225 U.S. 604 (1912) (DMRC Pet. at 7; Milliken Pet. at 18), this Court held, in the context of a patent suit, that an order of proof nearly identical to that set forth in the August 4 Order was perfectly permissible. In *Westinghouse*, a patentee sued an infringer to recover profits made by the infringer from the use of patented components that were incorporated in certain electrical transformers. In the subsequent accounting proceeding the master ruled, like the district court here, that it was sufficient for Westinghouse to introduce evidence of the infringer's total profits from the transformer sales. "The defendant then had the right either to disprove the plaintiff's case or to offer evidence in mitigation, or both." 225 U.S. at 616.

In the Supreme Court, the infringers attacked the master's order of proof ruling with the claim (similar to that made here) that Westinghouse had the burden of separating that portion of their profit attributable to the components covered by the infringed patent from the balance of the profit realized on the

sale of the transformers. This Court disagreed and ruled that where it was impossible to apportion the profits the "burden of separation is cast on the defendant," and that in such a case an order of proof similar to that provided for by the master (and the courts below in this case) was appropriate. *Id.* at 622; *see Hamilton-Brown Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 261 (1916).

The rule in *Westinghouse* has been adopted by this Court for antitrust treble damage actions (*Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946)) and has been followed in other treble damage actions like this one in which the actions of the defendants themselves define the amount of the overcharge. For example, in *Yoder Brothers* v. *California-Florida Plant Corp.*, 537 F.2d 1347 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977)—a case similar to this one in that the antitrust violation involved the unlawful collection of royalties—the antitrust claimants (defendants in that case) offered the total amount of royalties paid as one measure of damages. The court of appeals held that the royalty payments were proper evidence of damages, and indeed specifically stated, as did the courts below here, that the royalties constituted *prima facie* proof of damages. *Id.* at 1375. *Yoder* was reversed and remanded on other grounds. Significantly, however, in ordering the remand the court of appeals explicitly directed that "[o]n remand, the fact-finder must be permitted to consider the full amount of the overcharge—*i.e.* the total amount of royalties paid—as evidence of damages." *Id.* at 1376. *See also National Constructors Association* v. *National Electrical Contractors Association*, 498 F. Supp. 510, 550 (D. Md. 1980), *aff'd as modified*, 678 F.2d 492 (4th Cir. 1982).

The decision of the court of appeals affirming the *prima facie* ruling of the August 4 Order is thus hardly surprising in light of this Court's decisions in *Westinghouse* and *Bigelow* and the exercise of a lower court's issue-framing power in cases such as *Yoder*.

B. There Is No Conflict Between the Decision Below and Those of Other Circuits.

Petitioners ignore the established legal principles on which the decision below is based. Instead, in a transparent effort to concoct an issue worthy of this Court's attention, they first seek to shoehorn this case into the fact pattern of *In re Plywood Antitrust Litigation*, 655 F.2d 627 (5th Cir. 1981), *cert. granted sub nom. Weyerhaeuser Co.* v. *Lyman Lamb Co.*, 102 S. Ct. 2232 (1982) ("*Plywood*"), and then strive to manufacture a conflict among the circuits by setting this case and *Plywood* against a single, thirty-five year old district court opinion and a collection of utterly irrelevant delivered pricing and tying cases.

The differences between this case and *Plywood*, however, totally overwhelm any passing similarities. In *Plywood*, for example, the court failed to give the jury *any* instruction on measuring the amount of damages; here, the case was tried by an experienced trial judge who had the benefit of exhaustive briefing by both sides on that question. In *Plywood*, a treble damage judgment was entered at the end of the *liability* stage of a bifurcated trial in which the amount of damages question had been reserved for subsequent trial; here, a full damages trial was held. In *Plywood*, defendants were asking this Court to vacate a treble damage judgment as to which they contended there was no evidentiary foundation; here, defendants have already succeeded in having a treble damage judgment vacated and remanded for the consideration of additional evidence. And the question presented to this Court in *Plywood* (*see* DMRC Pet. at I n.), was, in essence, answered by the court of appeals here in Petitioners' favor (J.A. 9-11, 690 F.2d at 385-86) since, when this case is tried on remand, the district court will be required to decide whether the initial purchase price of the machines would have been increased if the production royalty programs had not been preserved by the illegal combination.

Moreover, the false twist royalties at issue here are markedly different from "phantom freight" charged in *Plywood* and the

two other "phantom freight" cases cited by Petitioners (DMRC Pet. at 11)[10] raise damages questions fundamentally different from those raised here. In those phantom freight cases, the defendant sold and transported his product for a single, unitary price which covered two cost components: the producer's cost of producing the product *and* the cost of shipping it to the customer. Measuring damages in such cases requires separating (by the party who bears the burden of separation) that portion of the phantom freight which covers the actual shipping cost or estimating how the base price of the product will change to cover the shipping cost if the freight charge is eliminated completely. To the extent that those cases say anything about damage measurement, they say only that where a single price which covers two distinct cost components is the subject of an antitrust violation, both cost elements must be considered in assessing the damages caused by the antitrust violation.

Here, by contrast, the costs associated with producing and selling the machines themselves were not incurred by Petitioners. Those costs were incurred by separate parties and their costs were covered by a machine purchase price which was not challenged in the litigation or involved in the illegal combination. The illegal royalty payments made to DMRC and shared with Chavanoz did not in any way relate to the costs incurred by the machine sellers, but rather were payments exacted under a separate license. Thus, unlike the "phantom freight" cases, the royalties were paid to a party other than the machine manufacturer, so those payments could not be transferred from one cost component to the other.

Viewed another way, it is simply not accurate to suggest that *Plywood* and the other "phantom freight" cases involve "two-part prices" (*see* DMRC Pet. at 8) in the same sense as the

10 Those two other "phantom freight" cases, *Albertson's, Inc.* v. *Amalgamated Sugar Co.*, 62 F.R.D 43 (D. Utah 1973), *aff'd in part, vacated in part*, 503 F.2d 459 (10th Cir. 1974); and *Boise Cascade Corp.* v. *FTC*, 637 F.2d 573 (9th Cir. 1980), in fact, did not involve damages issues at all.

present case. In those cases, the buyer received an invoice for one amount with no breakdown, as between the two distinct cost components or between the value received by the purchaser and the overcharge. Here, the "invoices" were sent to Respondents containing that very breakdown: one figure for the initial purchase price to Leesona or ARCT (the consideration for the machine) and another figure for the royalty payment to Leesona or DMRC (the overcharge, as shown by royalty reports). In other words, here there were two separately stated price components, the maintenance of only one of which was the subject of the combination and constituted the overcharge, at least *prima facie*. *See Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 489 (1968).

Futhermore, while the purpose of the combination in *Plywood*—and virtually all price fixing cases for that matter—was to get more for the product sold, the purpose of the combination here was far more specific and was established by findings made at the liability stage: it was to ensure that production royalties would be charged ("to preserve and enhance the interdependent royalty programs . . ." 444 F. Supp. at 682).

The tying cases cited by Petitioner (DMRC Pet. at 10-11; Milliken Pet. at 18, 20) present no conflict either. To the contrary, they demonstrate the propriety of the August 4 Order. In the typical tying case, the purchaser of the tied and tying goods receives two items of value. In *Siegel* v. *Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972), and *Kypta* v. *McDonald's Corp.*, 671 F.2d 1282 (11th Cir.), *cert. denied*, 103 S. Ct. 127 (1982), the plaintiffs received the value of their respective franchise licenses (the "tying" product) as well as the value of the "tied" products which they purchased. Accordingly, the courts in those cases quite properly held that the value of both products should be considered in measuring damages. The August 4 Order gave Petitioners the identical opportunity to demonstrate that the royalties which they charged the throwsters—like the prices for the tied products—were supported by some "lawful considerations," and the court of appeals, of course,

took an even more expansive view as to the evidence that Petitioners could offer.[11]

Finally, there is no need for this Court to devote time and effort to resolve an alleged conflict between a court of appeals decision, based on exceptional facts and involving bifurcated trials whereby amount of damages was tried against a background of extensive causality findings made at the earlier liability trial, and *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948), a single, rarely cited, thirty-five year old district court opinion in which the court ruled, on that case's own unique facts, that the plaintiff failed to prove fact of damage or causality at all.

11 Other cases relied on by Petitioners (DMRC Pet. at 11; Milliken Pet. at 18 and 20), such as *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980); *Jacobi* v. *Bache & Co.*, 377 F. Supp. 86 (S.D.N.Y. 1974), *aff'd*, 520 F.2d 1231 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976); and *MCI Communications Corp.* v. *American Tel. & Tel. Co.*, 1982-83 Trade Cases (CCH) ¶ 65,137 (7th Cir. Jan. 12, 1983), are irrelevant. *Catalano* and *Jacobi* did not contain holdings on the issue of damages at all. *MCI*, the one case in which a damages question was faced, is utterly inapposite. There, the court of appeals reversed and remanded an award of damages because the plaintiff included in its damage calculation losses from defendant's conduct which was found to be *lawful*. Here, by contrast, the *prima facie* rulings below simply reflect the finding made at the liability trial that Respondents were, in fact, damaged when they paid the very royalties, the maintenance and preservation of which were the purpose and effect of the illegal combination.

II.

NO QUESTION MERITING THIS COURT'S REVIEW IS PRESENTED BY THE RULING BELOW THAT PETITIONERS ARE PRECLUDED FROM ASSERTING AT THE DAMAGES TRIAL A CAUSALITY ARGUMENT WHICH THEY FAILED TO MAKE AND WHICH IS CONTRARY TO THE POSITION THEY ASSERTED AT THE INITIAL TRIAL AT WHICH THE ISSUES OF VIOLATION AND CAUSALITY WERE DETERMINED.

The district court's refusal to permit Petitioners to assert at the damages trial an unpleaded causality defense in the nature of *in pari delicto* raises no issue worthy of this Court's review. The courts below properly excluded that defense as untimely since causality was an issue litigated at the liability trial (J.A. 12-15, 690 F.2d at 387-88) and was resolved in the liability decision and subsequent affirmance on appeal.

Petitioners claim that Burlington should not be permitted to recover damages based on its royalty payments to Leesona because of the circumstances surrounding Burlington's settlement of an earlier litigation with Leesona. Burlington's allegedly wrongful conduct, the argument goes, caused its own injury. A detailed rebuttal of Petitioners' scenario is not appropriate here, but a few observations are warranted.

First, the district court's bifurcation order expressly left open only one issue for the subsequent damages trial—*i.e.*, the "amount of damages." That order (Pre-trial Order No. 76-1) was issued prior to the liability trial and stated: "All issues in the cases have been consolidated for trial except that the issue of the amount of damages, if any, shall be reserved for subsequent proceedings following determination of liability." (J.A. 111).[12] Accordingly, at the liability trial the district court

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12 The judgment entered by the district court upon conclusion of the liability trial reiterated that only the amount of damages remained to be litigated: "This court shall hereafter determine by separate trial the

proceeded to determine the issue of causality and found that Burlington was injured as a result of its royalty payments to DMRC and Leesona (*see* p. 9, *supra*).[13] Those findings were affirmed on appeal in the face of a major effort by Petitioners to obtain a reversal. The courts below properly concluded that the newly asserted defense was one which should have been raised at the liability trial, was not and was therefore lost.

Second, Petitioners had a full opportunity to present their contorted causality argument at the liability trial. Their failure to do so was not a mere oversight of a possible defensive argument, but represented a conscious trial strategy. Petitioners then affirmatively asserted the propriety of the same Burlington conduct which they now claim was improper and the real cause of Burlington's damages. For example, in their petition for certiorari seeking review of the liability issues, DMRC and Chavanoz told this Court: "We do not suggest an *in pari delicto* defense. Rather, we submit that what Burlington lawfully did, DMRC and Chavanoz were also free to do." (R.A. 5). Despite a full scale assault on causality at the liability phase of this litigation—from trial through appeal to their unsuccessful petitions for writs of certiorari—Petitioners never raised the causality argument which they now assert. Causality was found and affirmed and is now the law of the case. *See Terrell* v. *Household Goods Carriers' Bureau*, 494 F.2d 16, 21 n.9 (5th Cir.), *cert. dismissed*, 419 U.S. 987 (1974). Petitioners were properly precluded from endeavoring to relitigate the question at the damages trial—particularly by asserting a position directly contrary to the position they had earlier advanced.[14]

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amount of damages which plaintiffs are entitled to recover." (R.A. 6). Since liability had been found, the "if any" language from the pretrial order was deleted.

13 Milliken's statement that "[t]here was *no* finding one way or the other regarding the Leesona royalties as showing fact of injury" (Milliken Pet. at 15) (emphasis in original) is simply false.

14 Defendants' last minute attempt to change their interpretation of Burlington's conduct in itself provided an ample basis for its rejection.

(footnote continued)

Third, Petitioners now contend—for the first time in this litigation—that they were precluded from offering evidence of Burlington's allegedly wrongful conduct at the damages trial as a "beneficial byproduct" under *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 140 (1968). But the so-called "offer of proof" which they filed did not include any attempt to measure the supposed "competitive advantage" or "beneficial byproduct."[15] This contention is thus entirely unsupported by the record, and affords no basis for challenging the decision below.

Fourth, the purported conflict among the circuits over the appropriateness of converting an *in pari delicto* defense into an attack on causality which can be mounted against the amount of damages determination is non-existent. Not a single case cited by Petitioners as evidence of this conflict (DMRC Pet. at 16; Milliken Pet. at 14-17) concerned a bifurcated trial or addressed the question whether the *in pari delicto* or causality defense could be raised for the first time in a separate trial on

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Such revisionism offends the integrity of the judicial process, and is precluded by the doctrine of judicial estoppel. That doctrine, which is predicated upon a desire to prevent litigants from playing "fast and loose" with courts according to the "vicissitudes of self-interest," forbids a party who has taken one position from later in the course of that proceeding adopting an inconsistent position. IB J. Moore, *Moore's Federal Practice* ¶ 0.405[8], at 767-68 (2d ed. 1982); *Coleco Industries, Inc.* v. *United States International Trade Commission*, 573 F.2d 1247, 1258 (C.C.P.A. 1978); *Scarano* v. *Central Railroad*, 203 F.2d 510, 513 (3d Cir. 1953); *Selected Risks Insurance Co.* v. *Kobelinski*, 421 F. Supp. 431, 434-35 (E.D. Pa. 1976). Indeed, the doctrine of judicial estoppel was expressly recognized in an earlier stage of this litigation. *Duplan Corp.* v. *Deering Milliken, Inc.*, 397 F. Supp. 1146, 1177-83 (D. S.C. 1974).

15 In the courts below, the focus of Petitioners' argument was that their new-found causality defense, if recognized, would have barred Burlington from recovery of any damages or, at the very least, any damages based on royalty payments to Leesona. The court of appeals quite properly analyzed their argument as an untimely effort to raise the defense of *in pari delicto* (J.A. 12-15, 690 F.2d at 387-88).

the amount of damages, after causality had already been adjudicated and had become the law of the case through affirmance by the court of appeals.[16]

Fifth, neither *Knutson* v. *Daily Review, Inc.*, 664 F.2d 1120 (9th Cir. 1981), nor *Haverhill Gazette Co.* v. *Union Leader Corp.*, 333 F.2d 798 (1st Cir.), *cert. denied*, 379 U.S. 931 (1964), are relevant. Unlike the situation here, neither of those cases involved an attempt to relitigate at the damages trial issues previously resolved at an earlier trial and affirmed on appeal.

Finally, even if the courts below erred in excluding the proffered "evidence" of Burlington's own allegedly wrongful actions, the facts—when stripped of Petitioners' distortions—reveal nothing more than the efforts of a victim of an antitrust violation to mitigate its damages. Burlington, unlike defendants, was not a competitor of Leesona. Burlington was Leesona's customer and a victim of Leesona's illegal machine licensing program in which Leesona and its competitors shared royalties which were exacted from Burlington and other throwsters. The conduct of Burlington which Petitioners now question involved nothing more than an agreement between

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16 *See Pearl Brewing Co.* v. *Jos. Schlitz Brewing Co.*, 415 F. Supp. 1122 (S.D. Tex. 1976) (motion to strike defense of *in pari delicto* granted); *Kestenbaum* v. *Falstaff Brewing Corp.*, 514 F.2d 690 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976) (judgment for antitrust plaintiff reversed for failure to prove *fact* of damage); *Javelin Corp.* v. *Uniroyal, Inc.*, 546 F.2d 276 (9th Cir. 1976), *cert. denied*, 431 U.S. 938 (1977) (summary judgment for defendant on grounds of *in pari delicto* reversed); *Bernstein* v. *Universal Pictures, Inc.*, 517 F.2d 976 (2d Cir. 1975) (dismissal of case on grounds that NLRB had exclusive jurisdiction reversed; *Perma Life* discussed only by way of analogy). Although the Handler & Saks article cited by DMRC and Chavanoz (DMRC Pet. at 16) does discuss the proper scope to be accorded the *in pari delicto* defense in antitrust cases, the article actually refutes Petitioners' contention. The authors argue, *inter alia*, that *in pari delicto* should be utilized *as a defense to liability* as it was at common law. Handler & Saks, *The Continued Vitality of In Pari Delicto as an Antitrust Defense*, 20 Geo. L.J. 1123, 1152-55 (1982).

Burlington and Mechanical Specialty, a company which had sold Burlington a number of spindles for false twist machines, in which Mechanical Specialty agreed to refund to Burlington that portion of royalties paid by Burlington to Leesona which Leesona had agreed to kickback to Mechanical Specialty, one of its competitors, pursuant to a combination among Leesona and other manufacturers which was ruled *per se* illegal by the Court of Appeals for the Fifth Circuit.[17] Burlington, therefore, did nothing more than mitigate a portion of the damages which it sustained by reason of royalty payments to Leesona.[18]

Despite Petitioners' suggestion to the contrary (DMRC Pet. at 14 n.), Burlington never sought to recover treble damages for the royalties which were refunded to it by Mechanical Specialty and damages for those refunds were never awarded. Indeed, Burlington stipulated before the damages trial that the refunded amounts were not to be included in its damage computations.[19]

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17 The antitrust violation in question was adjudicated in *In re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127 (5th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977), a case involving, *inter alia*, antitrust claims brought against Leesona by Burlington and many other throwsters. It involved a scheme in which Leesona shared with other competing manufacturers of false twist machinery, pursuant to agreements whereby such manufacturers undertook to sell only to persons licensed by Leesona, one-third of the royalties which Leesona received from throwsters by reason of those throwsters' use of machines manufactured by the licensed Leesona competitor. The court found that that arrangement constituted a form of horizontal price fixing which operated to the detriment of throwsters such as Burlington.

18 Furthermore, as a simple matter of causality, all that the proffered evidence showed was that in 1963 Burlington took a Leesona license, for whatever reason, on its Mechanical Specialty spindles (it had already signed several such licenses to obtain machines directly from Leesona). Thereafter, it paid royalties and those royalties, like all others, would have been destroyed had the 1964 combination between defendants and Leesona not taken place.

19 The refunds received by Burlington from Mechanical Specialty were also insignificant in the context of the total royalties paid to Leesona by Burlington because the overwhelming majority of machines used by

Petitioners' effort to mischaracterize Burlington's simple effort to minimize its antitrust injury as some sort of culpable act reflects their desperation as this fourteen year old litigation draws to an end and the certainty of a substantial treble damage judgment looms on the horizon.[20] Petitioners' distorted and belated effort to reverse position and relitigate an already adjudicated issue raises no issue worthy of review by this Court.

III.

THE QUESTION OF CLAIM REDUCTION IS INEXTRICABLY LINKED TO CONTRIBUTION AND PRESENTS NO QUESTION FOR REVIEW BY WRIT OF CERTIORARI IN LIGHT OF THIS COURT'S DECISION IN *TEXAS INDUSTRIES.*

Petitioners' effort to circumvent this Court's recent ruling in *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981), that there is no right to contribution among antitrust defendants and thereby salvage their defense of "claim reduc-

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Burlington were not supplied to it by Mechanical Specialty but were supplied directly by Leesona on which Burlington paid, without refund, the same royalties as all other Leesona licensees. Thus, the record below showed that rebates received from Mechanical Specialty only amounted to six and eleven percent of Madison's and Burlington's respective Leesona royalty payments during the relevant period. This is hardly the "hidden one-third kickback on its royalty payments to Leesona" claimed by Petitioners (DMRC Pet. at 14).

20 In any event, the anticompetitive conduct which Petitioners seek to attribute to Burlington is conduct allegedly designed to gain it an anticompetitive edge over its throwster competitors. Even if true, that would be a fundamentally different conspiracy than the one found here—a horizontal conspiracy designed to injure defendants' customers or licensees. As the court of appeals recognized (J.A. 14, 690 F.2d at 398), the law is absolutely clear that Petitioners would not be immunized against liability to their victim by reason of that victim's alleged involvement in anticompetitive conduct of its own. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951).

tion" can be dealt with summarily. The decision of the Fourth Circuit rejecting that defense (J.A. 22-31, 690 F.2d at 391-95) was based on ample precedent which is confirmed by Petitioners' failure to make even a token effort to assert that the decision is in conflict with that of a single other circuit. Petitioners can make no such argument because, in the absence of a right to contribution, there is no defense of claim reduction.

Claim reduction is simply a corollary to contribution which is used to allocate liability among defendants when there have been partial settlements. Indeed, that position was eloquently advanced to this very Court by these same Petitioners—in the role of *amici curiae*—one year before *Texas Industries* was decided[21] and counsel maintained that position in the district court immediately after the *Texas Industries* decision was announced (*see* J.A. 71-72). We are aware of no case—and Petitioners cite none—in which a claim reduction defense was

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21 In their *amici curiae* brief in *Westvaco Corp.* v. *Adams Extract Co.*, 606 F.2d 319 (5th Cir.), *cert. dismissed*, 449 U.S. 915 (1980), a case in which the issue before the Court was the right to contribution in antitrust cases, Petitioners asserted:

> If this Court rejects the need for any damage apportionment in antitrust cases, it need not concern itself with claim reduction. If, on the other hand, the Court accepts damage apportionment as an equitable objective, it must consider the merits of claim reduction as the means to achieve apportionment in instances of partial settlements.
>
> . . . Our brief, therefore, will concentrate on the corollary rule of claim reduction as the means to adapt contribution principles to cases, such as this one, in which an antitrust plaintiff has reached settlements with some but not all of the defendents.
>
> Claim reduction has been developed as an adjunct to contribution to preserve the "finality" of partial settlements, since it is recognized that allowing claims for contribution to be asserted against defendants that have "bought their peace" would operate as a destructive deterrent to settlement. Under claim reduction, settling defendants are immune from claims for contribution; and a plaintiff's claim against remaining defendants is reduced by the amount for which settling parties would have been liable for contribution, had they not settled.

(R.A. 7).

sustained absent a pre-existing right of contribution. The court of appeals fully recognized that basic proposition and properly reversed the district court's claim reduction ruling in light of *Texas Industries*.

In an effort to avoid the fatal effect which *Texas Industries* has on their defense, Petitioners now ask this Court to take the revolutionary step of re-examining the entire rule of joint and several liability in antitrust cases, with the effect that it could be manipulated on a case-by-case basis, on the ground that its application here is somehow unfair. This Court succinctly dismissed that argument in *Texas Industries* as inappropriate for judicial consideration:

> The range of factors to be weighed in deciding whether a right to contribution should exist demonstrates the inappropriateness of judicial resolution of this complex issue. Ascertaining what is "fair" in this setting calls for inquiry into the entire spectrum of antitrust law, not simply the elements of a particular case or category of cases. Similarly, whether contribution would strengthen or weaken enforcement of the antitrust laws, or what form a right to contribution should take, cannot be resolved without going beyond the record of a single lawsuit. As in *Diamond* v. *Chakrabarty*, 447 U.S. 303, 317 (1980) [citations omitted]:
>
> "The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts."
>
> *Accord*, *United States* v. *Topco Associates*, 405 U.S. 596, 611-12 (1972) [citations omitted].

Id. at 646-47. There is no reason for this Court to reverse or abandon its ruling in *Texas Industries* and assume responsibility for deciding a question of "fairness" which is better left for Congress.[22]

Even if this Court considered it proper to address the fairness question, considerations of fairness do not require a result different from that reached below. The 1974 settlement of an industry-wide, patent-antitrust litigation between Burlington and Leesona was not a "sweetheart" deal between two co-conspirators, as suggested by Petitioners, designed to prevent exposure of Burlington's allegedly wrongful conduct (DMRC Pet. at 14 n., 19). Rather, the record below demonstrates that that settlement was part of a global settlement in which Burlington settled on the same basis as more than twenty other throwsters. Indeed, in commenting on his claim reduction ruling, the district judge made it plain that defendants' allegations concerning a "sweetheart" deal were "the farthest [thing] from my mind" (R.A. 8). Moreover, Petitioners' protestation concerning the "unfairness" of the size of Leesona's settlement payments to Burlington is completely exposed as hollow by the record below which reveals that Petitioners flatly refused to consider settling on a basis similar to the basis on which Leesona and Respondents settled in 1974 (R.A. 9).

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22 Indeed, this question has received intensive consideration in both houses of Congress. In the 97th Congress, no fewer than four bills were introduced which addressed the contribution—claim reduction question. Those bills—H.R. 1242, H.R. 4072, H.R. 5974 and S. 995—were the subject of extensive hearings, intense lobbying and long Congressional consideration. *See* Antitrust Equal Enforcement: Hearings on H.R. 1242, H.R. 4072, H.R. 5974 before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 97th Cong., 1st and 2d Sess. (1981-82); Antitrust Equal Enforcement Act: Hearings on S. 995 Before the Senate Comm. on the Judiciary, 97th Cong., 1st and 2d Sess. (1981-82); S. Rep. No. 97-359, 97th Cong., 2d Sess. (1982). The issue will, apparently, be considered again in the 98th Congress. In the House, Chairman Rodino of the House Judiciary Committee has introduced H.R. 2244 which addresses the contribution question. Similarly, in the Senate, S. 380 was recently introduced by Senators Hatch, Thurmond, Laxalt and DeConcini.

Moreover, when Respondents settled with Leesona they did so in reliance on then unquestioned law:

> (a) The releases from Respondents to Leesona contained language which was specifically drafted pursuant to *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 342-48 (1971), to reserve their rights to proceed against defendants here for the balance of their treble damage claims; and
>
> (b) The settlement was entered into at a time when the universally applied method for dealing with partial settlements in antitrust treble damage actions was to measure the damages suffered by the plaintiff as a result of the entire conspiracy (*i.e.*, the acts of all the defendants, both settling and nonsettling), treble the damages and subtract the dollar amount of settlement payments from the resulting treble damage figure. *E.g.*, *Flintkote Co.* v. *Lysfjord*, 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957). As the court of appeals below recognized, that remains the law to this day.

To change the rule concerning the treatment of partial settlements to favor the wrongdoer at the expense of the victim and apply it in a case where the settlement occurred nine years ago would be grossly unfair.

Any lingering doubt about the "fairness" of the decision below is put to rest by Petitioners' conduct. Petitioners' raw violation of the Sherman Act and callous disregard for the nation's antitrust laws fairly leap from the record in this case. Petitioners' attitude toward the antitrust laws is perhaps best reflected in the words of Norman Armitage, the DMRC official who was the principal architect of the illegal conspiracy. Armitage wrote:

> [I]t is a fact of life here that no one imputes any dishonesty to a corporation for breaking the antitrust laws. And the business community does not attach obloquy to anyone who seeks to improve his own business situation by establishing a monopoly.

444 F. Supp. at 705 n.45. This "cavalier attitude toward the antitrust laws" (R.A. 10) and the conduct which it spawned does not merit a reexamination of the doctrine of joint and several liability in the interests of "fairness" to the wrongdoer. Certiorari should be denied on the claim reduction question.

IV.

THE QUESTION RELATING TO THE ADEQUACY OF MADISON'S PLEADING OF ITS DAMAGES CLAIM RAISES NO ISSUE WORTHY OF REVIEW, LET ALONE A CONSTITUTIONAL DUE PROCESS ISSUE.

The final question raised by Petitioners DMRC and Chavanoz also presents no issue that requires review by this Court. Petitioners simply seek to escalate a factual issue arising from a mundane application of the pleading requirements of the Federal Rules of Civil Procedure and from their own waiver of discovery into a question of constitutional dimension.

Unlike the situations in the decisions cited in DMRC's Petition, Petitioners had full notice, by means of an April 1971 pleading conforming to the Federal Rules of Civil Procedure,[23] that Madison, a corporation formed by the merger of Madison and its former subsidiary Fedelon Throwing Company on October 3, 1970, asserted an antitrust claim against them, and that pleading incorporated, by operation of state law,[24] the

23 Rule 8 of the Federal Rules of Civil Procedure provides, *inter alia*, that a pleading shall contain "a short and plain statement of the claim."

24 The applicable corporation law of North Carolina, N.C. Gen. Stat. § 55-110(b) (1982) (*see* Statutory Appendix), provided that the October 1970 merger automatically transferred and vested all of the rights and privileges of Fedelon, including choses in action, in the surviving corporation, Madison, without the need for any "further act or deed." Thus, Madison indisputably obtained the right to sue in its own name only, as Petitioners implicitly conceded in the courts below (*see* J.A. 18).

identical claims previously held separately by Madison and Fedelon. Also, unlike the situations in those decisions, Petitioners, acting upon the notice thus afforded them, appeared and vigorously contested that antitrust claim. In so doing, however, they chose not to extend their intensive discovery efforts into the specifics of Madison's alleged damages until years later when the damages trial was imminent.

The requirements of due process—actual notice of the pendency of the action and an opportunity to be heard—were fully met. *Cf. Armstrong* v. *Manzo*, 380 U.S. 545, 550 (1965); *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940). Those requirements, however fundamental, have never been construed to impose an obligation that a plaintiff set forth in a pleading every evidentiary detail of his injury or damages claim. Indeed, under the Federal Rules of Civil Procedure, the function of particularization is allocated to the discovery rules. Those rules provided Petitioners the opportunity to seek and obtain additional information and, as a correlative, imposed on them an obligation to employ those procedures if they wanted to obtain particulars of Madison's claim. *Conley* v. *Gibson*, 355 U.S. 41, 47-48 (1957); *Hickman* v. *Taylor*, 329 U.S. 495, 501 (1947). But Petitioners chose not to avail themselves of their discovery opportunities—knowingly, consciously and as part of their litigation strategy—and must be deemed to have waived any right to later complain of surprise when the focus of the litigation shifted to the amount of damages issue.[25] The court of appeals correctly held that Petitioners, on those facts, had suffered no prejudice and could not justifiably "cry foul." (J.A. 20, 690 F.2d at 390). The pleading of Madison's damages claim simply raises no question appropriate for review by this Court.

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25 After liability was finally determined (and more than eight years after the amended pleading by post-merger "Madison"), Petitioners *first* sought discovery into the injuries claimed by Madison and the other plaintiffs. At that time they obtained documents relating to Fedelon's operations, corporate structure and merger, took depositions, independently corroborated Fedelon's royalty payments and eventually *stipulated* to the amount of those royalties.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully submit that the Petitions in No. 82-1410 and No. 82-1421 should be denied.

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Respectfully submitted,

DAVID L. FOSTER
WILLKIE FARR & GALLAGHER
One Citicorp Center
153 East 53rd Street
New York, New York 10022
(212) 935-8000

MCNEILL SMITH
SMITH, MOORE, SMITH,
SCHELL & HUNTER
P.O. Box 21927
Greensboro, North Carolina 27420
(919) 378-1450

Attorneys for Respondents

Of Counsel:

MICHAEL R. ABEL
MICHAEL C. LAMBERT
JAMES J. CALDER
WILLIAM K. WEST, JR.
W. WARREN TALTAVULL
LAURENCE H. LENZ, JR.
O. G. CALHOUN

[Adopted Finding 15.41]

15.41 From the onset of settlement negotiations—from the concept of "joining hands" (Finding 15.27, *supra*) through the proposals for royalty sharing in 1961 (Finding 15.29-15.30, *supra*), the May 1963 "agreement in principle" (Finding 15.32, *supra*), and as demonstrated by the Ward Smith Algonquin Club proposal to admit validity of the known-to-be-invalid Leesona patents (Finding 15.38, *supra*)—the underlying tenet of the settlement discussions between defendants and Leesona was one which Robert Leeson expressed succinctly in August 1963: "Everything to settle so that all competitors [charge] a royalty."

Annotations:

PX 353-5258—(identified by Leeson at Vol. 19—p. 3861)

[Adopted Finding 15.67]

15.67 The expressed objectives of the parties in settling were in accord with the "theme song" of the negotiations: to maintain the interdependent royalty programs:

(a) According to Leeson, Leesona's objective in reaching an accord with Whitin, DMRC and Chavanoz was to ensure that all of its competitors in the sale and licensing of false twist machines would charge a production royalty;

(b) Norman Armitage has admitted that a main factor in settling, even though the Chavanoz patents were not in issue, was DMRC's desire to "preserve and enhance" its royalty income; and

(c) As for Whitin, the "if you win, you lose" concept was regularly discussed, whether or not in those exact terms, and its realization that royalty-free machines would have a serious effect on ARCT sales was a dominant factor in settling. Bob Waters, in fact, aptly summarized the purpose of the settlement in a statement to one of the throwsters:

> "They [Whitin, DMRC and Chavanoz] did feel they had plenty of evidence to knock the [Leesona] patents out but in this case there would have been no royalty collected by Leesona which would have made it all the harder for ARCT to collect *any* royalty."

Significantly, in several days of testimony Waters made no attempt to disavow or explain away this pre-litigation explanation of the underlying reason for the settlement.

Annotations:

(a) *PX 353-5258*—Leeson's notes: "everything to settle. . . ."

(b) Vol. 21—p. 4371 (Armitage)—"preserve and enhance" royalty income.

Vol. 20—p. 4151-52 (Armitage)] similar testimony *re* preserva-
] tion of royalty structure be-
Vol. 78—p. 15188, 15190 (Armitage)] ing a reason for settling.

(c) Vol. 80—pp. 15544-45 (Waters)—regularly discussed at Whitin.

Vol. 14—pp. 2929-30 (Waters)—serious effect on ARCT sales if Leesona royalty-free; factor in settling.

PX 586-1687—Strub (Duplan) to Roberts memo 3/69: statement of Waters quoted in text.

[Adopted Finding 15.49]

15.49 The importance which the interdependency of royalty programs played in the thinking of the defendants is underscored by the reaction of Armitage, Waters, Soep and Crouzet to the commencement of litigation challenging the validity of the Leesona patents in 1969. The threat of possible royalty-free machines if the Leesona patents were invalidated led Armitage to write to Roger Milliken: ". . . it would be very difficult to sell the machines on a royalty basis if machines for a very similar purpose were being sold by Leesona royalty-free."* Waters, Crouzet and Soep all made similar observations in recognition of the possible adverse consequences of the suit against Leesona. Their concern was summed up by Waters:

> "Most every one feels quite convinced that the Leesona license and royaly system will fail and this does mean as you mentioned in your letter 'the whole system of licenses in the United States is doomed to failure.' "

Since ARCT's position in the market in 1969-1970 was at least as strong as, if not stronger than, its market position in 1963-1964, the foregoing observations expressed in 1969-1970 are clearly relevant to show interdependency as of 1963-1964.

***Annotations*:**

PX 459-682—Armitage to Milliken 11/69.

Vol. 80—p. 15673 (Waters)—very much concerned in 1969 that ARCT would be only licensed machine in U.S.

Vol. 18—p. 3727 (Waters)—sales would have been "far more difficult" if competitors selling royalty free.

Vol. 39—p. 7824-25 (Crouzet)

PX 460-837

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* Armitage made this observation after meeting with Petry, Conrad and Soep in October 1969 to discuss the impact of the suit against Leesona on the DMRC licensing program.

PX 461-5263

DX 789

DX 815—concern of Crouzet and Waters.

PX 1201

PX 1202

PX 1203

Vol. 76—pp. 14873-74—October 1969 meeting—Conrad, Soep, Petry and Armitage.

PX 462-5264—Waters to Crouzet 7/70: quoted in text.

PX 535-742—Soep to Armitage 12/69: quoted in text.

Vol. 82—pp. 15972-74 (Waters)—market for ARCT machines in 1963-1964 not stronger than in 1969-1970.

[Adopted Finding 15.82]

15.82 The agreements and understandings reached by the defendants and Leesona in connection with the settlement of the Whitin litigation had the following effects on United States trade and commerce in the sale and licensing of false twist texturing machines:

(a) All false twist machines continued to be sold subject to a license agreement providing for the payment of production royalties at rates which tended to remain stable. It was well recognized in the industry that all machines were sold only under either a Leesona or a DMRC license. It was not until 1969, after the commencement of this litigation and the commencement of similar litigation against Leesona, when several of Leesona's manufacturing licensees and then ARCT, Inc. began selling to non-licensees, that the "whole system of licenses in the United States"—which was the objective and effect of the 1964 agreement—began to breakdown;"

(b) Defendants and Leesona maintained their monopoly position in the sale and licensing of false twist machines in the United States; and

(c) At the time this litigation commenced, all high speed false twist machines in use in the United States were operated under a license from either Leesona or DMRC that provided for the payment of a production royalty on each pound of yarn processed on the machines. Thus, after 1964, each of the plaintiffs paid production royalties to DMRC and those plaintiffs that operated Leesona machines or machines of Leesona's manufacturer's licensees also paid production royalties to Leesona.

Annotations:

PX 462-5264—Waters to Crouzet 7/70: *re* "whole system of licenses in the United States".

Vol. 48—p. 9577—Topkis stipulation that all plaintiffs have paid royalties to DMRC.

e.g., Vol. 14—p. 2841 (Foil)

Vol. 15—pp. 3112-13 (Hamilton)

Vol. 27—pp. 5586-87; 5590 (Roberts)

Vol. 45—p. 9010 (Reed)—payment of royalties to Leesona.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.

DEERING MILLIKEN RESEARCH CORPORATION and
MOULINAGE ET RETORDERIE DE CHAVANOZ,

Petitioners,

—v.—

DUPLAN CORPORATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SIMON H. RIFKIND
JAY TOPKIS
JAY GREENFIELD
CAMERON CLARK
345 Park Avenue
New York, New York 10022
(212) 644-8000

Attorneys for Petitioners
Deering Milliken Research Corporation
and Moulinage et Retorderie de Chavanoz

Of Counsel:

HOWARD S. VEISZ
ANDREW KULL
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON
New York, New York

[Material Omitted]

[p. 15]

Ironically, one of the principal throwster-plaintiffs here is Burlington Industries, Inc., the largest textile company in the world. Burlington now complains that petitioners settled with Leesona. Yet in 1963 Burlington and its subsidiary, Madison, both settled identical litigation with Leesona: they took licenses from Leesona, they paid damages of $265,500 for past infringements, and they even consented to the entry of judgments adjudicating the Leesona patents valid (a step which Chavanoz and DMRC did *not* take). (A359-60.) Burlington must surely have realized—as did Chavanoz and DMRC—that the consequence of settlement would be "to preserve and enhance the interdependent royalty programs of Leesona and Chavanoz/DMRC which a trial of the pending litigation might well have destroyed." (444 F. Supp. at 682, A59.) Why, then, may Burlington sue Chavanoz and DMRC for following Burlington's lead? We do not suggest an *in pari delicto* defense. Rather, we submit that what Burlington lawfully did, DMRC and Chavanoz were also free to do.

[Material Omitted]

[pp. 22-24]

II.

Does the Fact that Plaintiffs Paid Royalties to DMRC after the Leesona Settlement Establish the Fact of Injury Required by Section 4?

The courts below ruled that plaintiffs need not prove that they have suffered actual injury as the result of the settlement of patent litigation. It is enough, the courts held, if plaintiffs show that they *might* have saved money *if* there had been no settlement.

This appears clearly from the only language which the trial court devoted to the "fact" of injury (444 F. Supp. at 687, A72):

"The sizable royalty income collected by DMRC in the years following the settlement affords graphic proof of the impact which the [licensing] program had upon [plaintiffs'] businesses [fn. on annual royalty income received by DMRC, ranging from $1,000 in 1959 to $123,302 in 1964 to $3,329,303 in 1969 to $982,640 in 1972]. The court concludes that as a direct consequence of the violations of Sections 1 and 2 of the Sherman Act by DMRC and Chavanoz the plaintiffs have been injured in their business and property within the purview of 15 U.S.C. § 15."

Thus the court holds that "injury" is proven by the fact that the throwsters continued to pay royalties to DMRC after the 1964 Leesona settlement. To reach this conclusion, the trial court necessarily but silently rested on a chain of assumptions which were not and never could have been proven, among them:

(1) That if the settlement had not taken place, the Chavanoz side would have pressed the litigation through trial, appeal, certiorari petition, etc., winning on all three Leesona patents in suit at all times;

(2) That invalidation of the three Leesona patents in suit would have resulted in Leesona's abandoning its royalty program, even though Leesona had other patents which could have (and did) support a royalty program;

(3) That the elimination of a Leesona royalty program would have necessitated reduction or elimination of the Chavanoz/DMRC royalty program—despite the fact that, as the trial court said, patented ARCT machines were "in great demand in the industry" (444 F. Supp. at 750, A216), and even though Chavanoz continued to introduce and patent new features after the settlement.

There is no way, we submit, for mortal man to do anything but guess as to whether any of these assumed "facts" would have

occurred, to what degree, and when, had the settlement not taken place. In any event, there is no *proof* whatsoever in this record. The courts below referred to none. And it is proof of real injury which Section 4 requires.

[Caption Omitted]

Amended Judgment Order

These cases having been duly consolidated for trial and having come on for trial on the liability issues only (including, as to the antitrust claims, violation of law and fact of damage) before the undersigned United States District Judge, all parties having waived trial by jury, and witnesses for all parties having been heard, documentary and physical exhibits having been received in evidence, and the Court having heard arguments on the facts and the law and having made its findings of fact and conclusions of law in the Memorandum of Decision filed July 29, 1977, now, therefore, pursuant to the Memorandum of Decision filed July 29, 1977, it is

ORDERED, ADJUDGED AND DECREED:

[Material Omitted]

10(a). Defendants Chavanoz, DMRC and DMI have by the Leesona settlement of March 31, 1964, and their activities subsequent thereto conspired with Leesona to violate Sections 1 and 2 of the Sherman Act with resulting damage to the business and property of the plaintiffs (15 U.S.C. § 1 and 2).

(b). Plaintiffs shall have and are hereby granted judgment pursuant to the foregoing findings of liability. This court shall hereafter determine by separate trial the amount of damages which plaintiffs are entitled to recover.

[Material Omitted]

/s/ F. T. Dupree, Jr.

F. T. DUPREE, JR.
United States District Judge
Eastern District of North Carolina
(Sitting by Designation)

Dated: October 31, 1977

JUDGMENT ENTERED ON THE DOCKET
This 2nd day of November, 1977.

MILLER C. FOSTER, JR., *Clerk*
by: /s/ Edith W. Thomas
Deputy Clerk

No. 79-792

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

WESTVACO CORPORATION, PACKAGING
CORPORATION OF AMERICA, and
GEORGIA-PACIFIC CORPORATION,

Petitioners,

—v.—

ADAMS EXTRACT COMPANY, *et al.,*

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF MILLIKEN & COMPANY, MILLIKEN RESEARCH CORPORATION AND MOULINAGE ET RETORDERIE DE CHAVANOZ AS AMICI CURIAE

SIMON H. RIFKIND
345 Park Avenue
New York, New York 10154
(212) 644-8000

Counsel of Record for
Milliken & Company, Milliken
Research Corporation and
Moulinage et Retorderie de Chavanoz

Of Counsel:

JAY TOPKIS
JAY GREENFIELD
STEVEN B. ROSENFELD
RONALD W. MEISTER
HOWARD S. VEISZ
ANDREW KULL
GERARD E. HARPER
PAUL, WEISS, RIFKIND, WHARTON & GARRISON

[Material Omitted]

[p. 4]

I.

CLAIM REDUCTION AFFORDS AN EQUITABLE APPORTIONMENT OF DAMAGES IN CASES INVOLVING PARTIAL SETTLEMENTS.

If this Court rejects the need for any damage apportionment in antitrust cases, it need not concern itself with claim reduction. If, on the other hand, the Court accepts damage apportionment as an equitable objective, it must consider the merits of claim reduction as the means to achieve apportionment in instances of partial settlements.

[p. 5]

We are sure that the parties' briefs will discuss at length the conflict in the Courts of Appeals on the broad issue of damage apportionment and the desirability in general of a rule permitting contribution in antitrust cases. Our brief, therefore, will concentrate on the corollary rule of claim reduction as the means to adapt contribution principles to cases, such as this one, in which an antitrust plaintiff has reached settlements with some but not all of the defendants.

Claim reduction has been developed as an adjunct to contribution to preserve the "finality" of partial settlements, since it is recognized that allowing claims for contribution to be asserted against defendants that have "bought their peace" would operate as a destructive deterrent to settlement. Under claim reduction, settling defendants are immune from claims for contribution; and a plaintiff's claim against remaining defendants is reduced by the amount for which settling parties would have been liable for contribution, had they not settled. By acceptance of a partial settlement, in other words, the plaintiff is regarded as having sold his claim for any damages attributable to the party with whom he settles.

TRANSCRIPT OF HEARING AT ELIZABETH CITY, NORTH CAROLINA, ON MARCH 3, 1982

[Caption and Appearances can be found in the Joint Appendix at 90-91]

[Material Omitted]

[pp. 5-6]

MR. FOSTER: Yes, Your Honor, you have precisely identified one of the two possible what we consider misunderstandings that could arise.

A second possible misinterpretation of the term "particular circumstances" or whatever that term was in Your Honor's initial Order, might be a contention that Your Honor perceived the Lesona (phonetic) settlement involving Burlington and the throwsters as some sort of a sweetheart deal.

The words that are used when this subject is discussed in the Congress by our friends from the other side are "blackmail" and "extortion." We haven't heard those words in the Courtroom in this case, and I don't believe that there should be any misunderstanding about that either. That's the concern I had.

THE COURT: Well, let me say that the latter of those things is the farthest from my mind, and that with respect to the other things, the adopting of some language, you know, I can't carry all of this—probably I ought to, but exactly what I said and why I said it some five or six years ago in this thirteen year old litigation.

It was farthest from my mind that we would ever open up anything other than the question of the viability and applicability of the defense of claim reduction.

And so, whatever is necessary to explicate that on the record so that the issue will be clearly defined for the Fourth Circuit to say here and now whether or not claim reduction applies in this case, or in any case ever.

[Caption and Appearances Omitted]

March 26, 1976

10:00 O'Clock A.M.

PRE-HEARING CONFERENCE

JUDGE FRANKLIN T. DUPREE, JR., Presiding

[Material Omitted]

THE COURT: How come this case isn't settled?

MR. RIFKIND: I can answer it briefly. I can say that we—

THE COURT: It is all their fault?

MR. RIFKIND: No, we want them to pay us a lot of money for the royalties they owe us and they say they don't owe us any royalty and we owe them a lot of damages by way of antitrust. We have never been able to cross that bridge in both directions.

THE COURT: I interpret that to be the situation that obtains in most settlement—

MR. RIFKIND: That is true.

THE COURT: —cases. That is, the posture of most settlements is that they are too far apart in dollars and that is what lawsuits are usually about.

Does anyone feel that further conversations looking to amicable disposition might be fruitful?

MR. SMITH: Your Honor, I think it depends on the posture and principle with which the other side approaches the matter. I mentioned earlier that some litigation had been terminated and on a basis very satisfactory to the throwsters. That proves that we are not impossible to deal with.

If these gentlemen want to approach the matter in the way that their counterparts approached it, there could be some

fruitful result, but that is a commitment that we have never had from the other side.

MR. WEST: Your Honor, mention has been made already of the litigation that most of our clients had with Leesona, which involved pretty much the same issues. They wanted royalties from us and we wanted royalties back that we had already paid. That litigation was finally resolved last year. Leesona makes no further claim that either their patents or license agreements are enforcible [sic] and they did repay us some of the margin.

MR. RIFKIND: We are not prepared to operate in that kind of territory at all.

[Adopted Finding 15.59]

15.59 Although desiring to avoid the appearance of an antitrust violation, Armitage's cavalier attitude toward the antitrust laws is revealed in a letter to Soep dated August 19, 1963:

> ". . . it is a fact of life here that no one imputes any dishonesty to a corporation for breaking the antitrust laws. And the business community does not attach obloquy to anyone who seeks to improve his own business situation by establishing a monopoly."

Annotations:

PX 435-633A

§ 55-110. Effect of merger or consolidation.

(a) When such merger or consolidation has been effected:

(1) The several corporations parties to the plan of merger or consolidation shall be a single corporation, which, in the case of a merger, shall be that corporation designated in the plan of merger as the surviving corporation, and, in the case of a consolidation, shall be the new corporation provided for in the plan of consolidation;

(2) The separate existence of all corporations parties to the plan of merger or consolidation, except the surviving or new corporation, shall cease;

(3) Such surviving or new corporation shall have all the rights, privileges, immunities and powers and shall be subject to all the duties and liabilities of a corporation organized under this Chapter.

(b) Such surviving or new corporation shall thereupon and thereafter, to the extent consistent with its charter as established or changed by the merger or consolidation, possess all the rights, privileges, immunities, and franchises, as well of a public as of a private nature, of each of the merging or consolidating corporations; and all property, real, personal and mixed, and all debts due on whatever account, and all other choses in action, and all and every other interest, of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed; and the title to any real estate or any interest therein, vested in any of such corporations shall not revert or be in any way impaired by reason of such merger or consolidation. The provisions of this subsection are subject to the provisions of G.S. 47-18.1, with regard to the registration of certificates of merger or consolidation if the title to real property is affected.

. . .